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March 30, 2010

VIA UPS OVERNIGHT MAIL

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E. Street, SW
Washington, D.C. 20024

Re: STB Docket No. 42118

226440



Dear Acting Secretary Quinlan:

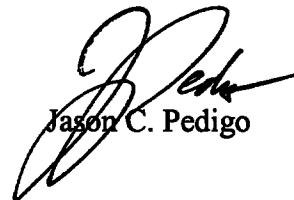
Enclosed for filing in the above-referenced case are an original and eleven copies of Bampton Enterprises' Reply to Norfolk Southern's Motion to Dismiss Complaint, together with three disks containing electronic copies.

Please return the extra copy, date-stamped, in the return envelope provided.

I remain,

ENTERED
Office of Proceedings
MAR 31 2010
Part of
Public Record

Very truly yours,


Jason C. Pedigo

JCP/kdr

Enclosure

cc(w/encl.): David L. Meyer
Karen E. Escalante
James A. Hixon
John M. Scheib

BEFORE THE
SURFACE TRANSPORTATION BOARD

BRAMPTON ENTERPRISES, LLC
D/B/A SAVANNAH RE-LOAD

Complainant,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY,

Defendant.

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Docket No. 42118

BRAMPTON ENTERPRISES' REPLY
TO NORFOLK SOUTHERN RAILWAY COMPANY'S MOTION TO DISMISS
COMPLAINT

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Dated: March 30, 2010



BEFORE THE
SURFACE TRANSPORTATION BOARD

BRAMPTON ENTERPRISES, LLC)
D/B/A SAVANNAH RE-LOAD)

Complainant,)

v.)

Docket No. 42118

NORFOLK SOUTHERN RAILWAY)
COMPANY,)

Defendant.)

BRAMPTON ENTERPRISES' REPLY TO
NORFOLK SOUTHERN RAILWAY COMPANY'S MOTION TO DISMISS
COMPLAINT

Complainant Brampton Enterprises (hereinafter "Brampton") files this Response to Motion to Dismiss of Norfolk Southern Railway Company (hereinafter "NS"). NS argues it acted reasonably when it imposed a crippling security deposit upon Brampton after Brampton failed to pay inaccurate demurrage bills for which it was not liable. NS claims it acted reasonably because it did not issue invoices it "knew to be erroneously computed," (Mtn. p. 23) and is entitled to demand a deposit from the wrong entity so long as it "reasonably concluded" (Mtn., p. 34) that such entity might be liable. In short, NS argues it must have been "clear to NS that Brampton had no responsibility for the underlying demurrage charges" (Mtn., p. 30) before the Board can conclude it acted unreasonably. While there is evidence to show it was "clear" to NS that its demurrage claim was unfounded, Brampton disagrees NS must act recklessly or with malice in order to act unreasonably. Under this Board's precedent, the risk of harm resulting from a security deposit is great and NS was obligated to ensure it was on firm footing—both in

the amount of demurrage it demanded and with respect to Brampton's liability—for it to have acted reasonably in instituting a demurrage deposit.

Summary of Argument

As an initial matter Brampton's complaint is not time barred by Section 11705(c). NS argues that its security deposit constitutes a single "affirmative act" which occurred more than two years ago. However, NS repeatedly imposed this deposit each and every day between August 1, 2007 and December 12, 2008. Thus, it is the independent imposition of this deposit each day—not simply the first day—which gives rise to this complaint. In situations such as this, each new act gives rise to a new cause of action and the Board simply counts back two years from the date of the complaint to set a cutoff point for relief. *Groome & Associates, Inc. v. Greenville, County Economic Development Corp.*, STB Docket No. 42087 (served July 27, 2005), p. 7. Therefore, as Brampton alleged in its complaint (Comp., ¶ 46) it is entitled to damages for the two-year period preceding the date of its complaint.

NS's motion to dismiss should be denied because it fails to show that the allegations in Brampton's complaint, when considered in the light most favorable to Brampton, do not provide a basis for relief. Indeed, NS declines to address numerous allegations in Brampton's complaint, *inter alia*, (1) NS was unable to settle on the correct amount of demurrage allegedly due (Comp., ¶ 11); (2) NS consistently overstated the amount of demurrage allegedly due (Comp., ¶¶ 11-12); (3) NS demanded demurrage for certain shipments where it knew Brampton had no legal obligation to pay (Comp., ¶ 25); NS willfully disregarded the District Court's order and maintained the deposit in the face of a ruling that Brampton was not liable for the underlying demurrage (Comp., ¶ 30). NS makes no effort to argue these practices were reasonable.

Moreover, those portions of Brampton's complaint which NS does address state a claim for which relief can be granted. NS claims its deposit was reasonable because Brampton failed to "pay demurrage bills for cars that were consigned to and accepted by it for delivery." (Mtn., p. 7)(emphasis added). However, NS's decision to impose a demurrage deposit had nothing to do with Brampton's alleged consignee status. Instead, NS demanded demurrage from Brampton solely because Brampton received the subject freight, and NS therefore demanded demurrage for which Brampton was not even listed as the consignee. (Affidavit of Jason Pedigo, Ex. A-1).¹ However, one is not liable for demurrage based upon "the mere fact of handling the goods shipped." *Middle Atlantic Conference v. U.S.*, 353 F. Supp. 1109, 1118 (D.C. D.C. 1972). Thus, NS imposed a deposit after demanding demurrage for which it knew Brampton was not liable. This unreasonable practice is in addition to NS's inability to correctly determine the amount of demurrage which actually accrued and its refusal to lift the deposit following the District Court's order granting summary judgment to Brampton.

Statement of Facts

A. Brampton's operations

Brampton operates a warehouse business under the trade name "Savannah Re-Load" and handles, among other things, freight delivered by NS. (Verified Statement of Karen Escalante, NS Ex. A).² NS can deliver five rail cars at any one time to Brampton's facility and Brampton typically releases empty rail cars to NS within 24 hours of delivery. (Affidavit of William Groves, Ex. B). From February 2007 until the time NS instituted the demurrage deposit, Brampton usually received five rail cars per day. (*Id.*). The rail freight delivered to Brampton's

¹ Portions of the record developed in the underlying federal court litigation are attached to the affidavit of Jason Pedigo.

² Through Ms. Escalante's verified statement. NS has attached to its motion two affidavits executed by Brampton manager William Groves. (Escalante V.S., Ex. A, E). In order to avoid unnecessary duplication, Brampton adopts by reference Ms. Escalante's and Mr. Paul Young's verified statements and their attachments.

facility in 2007 came at the direction of Galaxy Forwarding, a freight forwarding company. (Escalante V.S., NS Ex. E). Galaxy Forwarding unilaterally made its transport arrangements without input from and without giving notice to Brampton Enterprises.³ (*Id.*). To the extent Brampton was named as consignee on any bills of lading associated with the freight it handled, Brampton did not know of or consent to this designation. (Escalante, V.S., NS Ex. A).

B. NS's demand for demurrage and security deposit

Eventually, NS began billing Brampton for demurrage for no other reason than because Brampton was the freight recipient. (Pedigo Aff., Ex. A-1). Thus, NS sought to hold Brampton liable for demurrage which allegedly accrued on all freight delivered to Brampton's facility, regardless of whether Brampton was the consignee. (*Id.*). Brampton disputed the demurrage charges over a lengthy period of time,⁴ prompting NS to threaten Brampton with a deposit requirement unless Brampton paid \$62,710 in demurrage by July 19, 2007. (Groves Aff., Ex. B-1). However, On July 25, 2007, NS acknowledged that it had overbilled Brampton on four of the five demurrage invoices. (Groves Aff., Ex. B-2). Two days later, on July 27, 2007, NS concluded that the fifth demurrage invoice, not yet issued at the time of the \$62,710 demand, was also too high. (Groves Aff., Ex. B-3). Nevertheless, NS informed Brampton on July 31, 2007 that it would have to pay a non-transferrable deposit of \$1,200 per rail car in order to receive rail freight.⁵ (Groves Aff., Ex. B-4). The next day, NS reiterated its position and informed Brampton that litigation was forthcoming. (Groves Aff., Ex. B-5). Thus, NS imposed

³ NS distinguishes unfavorable decisions by claiming they "involved situations where the entities from which the carrier was seeking to collect demurrage were, both objectively and from the carrier's perspective, far less involved in the contract of carriage relationship between shipper and carrier than was Brampton." (Brief, p. 32). NS fails to provide a record cite for this assertion and does not explain why it perceived Brampton to have more "involvement" with the contract of carriage.

⁴ NS claims that Brampton did not quarrel with NS's calculation of the amount owed. (Mtn., p. 11). NS fails to provide a record cite for this assertion.

⁵ NS did not—and still has not—identified which car accrued \$1,200 in demurrage.

a deposit requirement approximately one week after concluding every single demurrage invoice issued to date was flawed. Two weeks later, NS abruptly increased the amount of demurrage it demanded to \$133,000. (Pedigo Aff., Ex. A-2).

NS's deposit requirement presented an impossible challenge for Brampton. Because Brampton typically received five rail cars per day⁶ (Groves Aff., Ex. B), NS's deposit required it to deposit \$6,000 per day. While NS's tariff "caps" the deposit at the total demurrage "owed", (Verified Statement of Paul Young, NS Ex. 1-A), NS's demand went as high as \$133,080 and Brampton would have been forced to continue depositing \$6,000 per day until it reached this figure. Moreover, the "cap" provided by NS's tariff afforded Brampton limited protection. NS reserved to itself the right to deduct from this deposit any demurrage which it unilaterally alleges has accrued on the deposited freight cars. (NS Tariff 8002-A (Item 6160(E), Ex. 1-A). Thus, NS—with its history of overbilling demurrage—would have used Brampton's deposit to pay for demurrage, even where Brampton was not the named consignee. Brampton would therefore be forced to initiate expensive legal action to recover these "payments" and at the same time to replenish the depleted deposit. When Brampton did pay the deposit, NS, by its own calculations, waited up to 65 days to return the deposit. (Mtn., p. 11). Brampton concluded it was unable to permanently deposit the full amount in controversy with NS and therefore saw its rail freight business choked off.

C. The ensuing litigation

After it imposed the deposit requirement, NS sued Brampton in the Southern District of Georgia on October 11, 2007, for \$133,080. (Pedigo Aff., Ex. A-6). NS's demurrage claim, and therefore its deposit, had nothing to do with whether Brampton was named as consignee on the

⁶ NS dismisses this figure as hypothetical, (Mtn., p. 12); however, it is based upon Brampton's activity until the moment NS's deposit halted its rail business. Moreover, NS cannot impose an unreasonable deposit Brampton cannot pay and then defend it by pointing out that Brampton never paid it.

applicable bills of lading.⁷ (Pedigo Aff., Ex. A-1). On December 11, 2007, Brampton wrote NS to (1) inform NS that Brampton was not the consignee for the freight it handled, (2) inform NS that it was Brampton's understanding that only some of the bills of lading at issue allegedly even named Brampton as consignee, (3) ask NS to set forth the legal basis for liability, and (4) offer to discuss an interim agreement whereby the parties could resume business while protecting NS against any demurrage which might accrue in the future. (Pedigo Aff., Ex. A-3). NS declined to reevaluate its deposit or even entertain any alternative security. (Pedigo Aff., Ex. A-4; Pedigo Aff., Ex. A-5).

On February 18, 2008, Brampton moved for summary judgment on the grounds that it had never consented to being named consignee on any bills of lading and did not know it had been inaccurately named as such. (Escalante V.S., Ex. A). In responding to Brampton's brief, NS represented to the District Court that "Norfolk Southern sought payment from [Brampton] because the bills of lading and/or electronic bill of lading data (attached to the referenced Affidavit) identify [Brampton] as the consignee to whom delivery must be made." (Pedigo Aff., Ex. A-7, p.2). However, this statement, like NS's current statements to this effect, was inaccurate. NS sought demurrage from Brampton solely because Brampton was the freight recipient. (Pedigo Aff., Ex. A-1). It was not until March 31, 2008, that NS amended its complaint to exclude demurrage which accrued on shipments whose bills of lading did not identify Brampton as the consignee. (Pedigo Aff., Ex. A-8; Pedigo Aff., Ex. A-1).

On September 15, 2008, the District Court ruled in favor of Brampton and held that it was not liable for the demurrage charges which formed the basis of NS's deposit requirement.

Norfolk Southern Ry. Co. v. Brampton Enterprises, LLC, 2008 WL 4298478 (S.D. Ga. 2008).

⁷ NS's drafted its tariff to permit it to recover demurrage from a consignee; however, it defined "consignee" to include anyone who is merely "entitled to receive the shipment." (Mtn, p. 26). Thus, NS's tariff permits it to demand demurrage from—and impose a deposit upon—a non-consignee.

Four days later, Brampton wrote NS to request that NS confirm it would lift the deposit requirement. (Pedigo Aff., Ex. A-9). On September 23, 2008, NS informed Brampton that, notwithstanding the District Court's order, NS would not lift the deposit.⁸ (Pedigo Aff., Ex. A-10). NS left the deposit requirement in place until December 12, 2008, when the parties reached a contingent settlement. (Answer, ¶ 31). After the contingency failed, NS re-imposed the deposit on March 4, 2009. (Groves Aff., Ex. B-6). Brampton then had to file a Motion to Enforce Judgment in which it asked the District Court to prevent NS from re-imposing its deposit requirement. (Pedigo Aff., Ex. A-11). The District Court threatened to sanction NS for its behavior (Pedigo Aff., Ex. A-12), causing NS to quickly lift its deposit requirement, (Pedigo Aff., Ex. A-13).

Argument and Citation of Authority

A. Motion to Dismiss Standard

“As a general rule, a motion to dismiss is a disfavored request and rarely granted in judicial and administrative proceedings.” *Garden Spot & Northern Limited Partnership And Indiana Hi-Rail Corporation - Purchase And Operate - Indiana Rail Road Company Line Between Newtom And Browns, Il Archer-Daniels-Midland Company, Reinbold Grain Company, Siemer Grain Company, And Willow*, I.C.C. Docket No. 40857, (served January 5, 1992), p.2. This is especially true where, as here, the complainant has not been afforded the opportunity to conduct discovery. “[M]otions to dismiss prior to the submission of evidence are generally denied, to insure that participants have a full and fair opportunity to meet their burden of proof.” *North America Freight Car Association-Protest and Petition For Investigation-Tariff Publications of the Burlington Northern and Santa Fe Railway Company North America Freight*

⁸ In this letter, counsel for NS stated that the District Court's order was “presently unenforceable.” However, a District Court's order is enforceable unless and until it is stayed pursuant to Federal Rule of Civil Procedure 62. *Deering Milliken, Inc. v. F.T.C.*, 647 F.2d 1124, 1128-1129 (D.C. Cir. 1978).

Car Association v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42060 (served August 13, 2004), p. 7.

In considering a motion to dismiss, we must construe factual allegations in the light most favorable to the complainant. *See, e.g., Sierra Pacific Power Co. & Idaho Power Co. v. Union Pacific Railroad Co.*, STB Docket No. 42012 (STB served Jan. 26, 1998); *Trailer Bridge, Inc. v. Sea Star Lines, LCC*, STB Docket No. WCC-104 (STB served Dec. 10, 1999) (*Trailer Bridge*). A decision on a motion to dismiss is not an indication of how the case will ultimately be decided on the merits, after all of the evidence is submitted. Rather, it is simply a determination of whether the factual allegations, when considered in the light most favorable to the complainant, would provide a basis for relief. We dismiss complaints only when we find that there is no basis on which we could grant the relief sought. *See Grain Land Coop v. Canadian Pacific Limited and Soo Line Railroad Company d/b/a CP Rail System*, STB Docket No. 41687 (STB served Dec. 8, 1999).

Government of the Territory of Guam v. Sea-Land Service, Inc., American President Lines, Ltd., and Matson Navigation Company, Inc. STB Docket No. WCC-101 (served November 15, 2001) p.2.

B. NS improperly asks the Board to overturn rulings from both the District Court and Eleventh Circuit and relitigate Brampton's liability for the subject demurrage.

NS asked the United States District Court for the Southern District of Georgia to determine whether Brampton was liable for demurrage. (Pedigo Aff., Ex. A-6). When the District Court decided that Brampton was not liable, NS chose to disregard it and to continue

imposing its deposit requirement. (Pedigo Aff., Ex. A-10). Now that the Eleventh Circuit has also ruled against NS, *Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273 (11th Cir. 2009), NS shows a similar contempt. It claims that the Eleventh Circuit opinion “cannot govern the results here” and that the Board must “heed its own well-established jurisdiction to determine responsibility for [the underlying] demurrage” charges. (Mtn., p. 29). In effect, NS seeks to relitigate whether Brampton was liable for the underlying demurrage and asks the Board to disapprove of the rulings from the District Court and the Eleventh Circuit. (Mtn., pp. 29-33)(“the Board should not countenance Brampton’s efforts to disclaim responsibility for demurrage charges.”).

A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a “right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . .” Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation

attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. U. S., 440 U.S. 147, 153-154, 99 S.Ct. 970, 973 - 974 (1979)(citations omitted).

Thus, Brampton's non-liability for demurrage is conclusively established and NS cannot solicit an opinion from the Board to the contrary. "No coordination would be achieved by requiring a District Court, after it has rendered a judgment, to vacate that judgment upon motion and refer a question it has already decided to an agency." *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 253 (3rd Cir. 2007)(holding that carrier could not get "second bite at the apple" by having Surface Transportation Board review district court's judgment). Thus, the Board should decline NS's invitation to re-argue and relitigate Brampton's liability for demurrage.

C. Brampton's claim is not barred by 49 U.S.C. § 11705(c).

Brampton seeks to recover for NS's unreasonable rules and practices which occurred between January 2008 and December 12, 2008. NS argues that this claim is barred by the two-year statute of limitations in 49 U.S.C. § 11705(c) because NS first imposed a deposit in 2007. (Mtn., p. 13). However, in order to bring a claim for damages, Brampton first had to sustain damages. 49 U.S.C. § 11704(b). It is axiomatic that, until the damage "actually was sustained by [Brampton], it did not have a cause of action against [NS], and the prescriptive period did not begin to run." *City of Cairo v. Hightower Consulting Engineers, Inc.*, 278 Ga. App. 721, 727, 629 S.E.2d 518, 524 (2006). NS argues that "[a]ll of Brampton's damages claims accrued in 2007" (Mtn., p. 13); however, Brampton could not have filed suit in December 2007 for damages it expected to suffer in 2008. *Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., Ltd.*, 470 F. Supp. 610, 618 (S.D. N.Y. 1979)("It is clear, therefore, that plaintiffs have not yet suffered any injury as a result of defendants' actions; they merely seek to recover

damages for speculative injuries not yet incurred.” Simply put, each day NS imposed a deposit requirement was a new day Brampton sustained damage. As such, each day constituted a new cause of action.

In a rail rate case, for example, if a carrier makes repeated shipments to a customer, each shipment effectively constitutes a new cause of action, even though the conduct – charging the challenged rate – is the same each time the carrier makes a delivery. Thus, to determine timeliness for statute of limitations purposes, in such cases the Board simply counts back 2 years from the date of the complaint to set a cutoff point for relief; and if a shipper files a complaint about a particular rate level charged over a period of time, it generally may recover only as to shipments that moved within 2 years of the filing of the complaint.

Groome & Associates, Inc. v. Greenville, County Economic Development Corp., STB Docket No. 42087 (served July 27, 2005), p. 7. Just as in the instant litigation, “[e]very day that [the carrier] did not provide the service Complainant[] sought was, in essence, a new ‘act or omission’ that can serve as the basis for a new cause of action. Accordingly, the request to dismiss the complaint in its entirety must be denied.” *Id.*

D. Brampton’s allegations are sufficient to state a claim.

NS acknowledges that “reviewing the reasonableness of a carrier’s application of its demurrage deposit program to a particular situation is a fact-driven inquiry.” (Mtn., p. 16). However, by filing this motion before discovery has commenced, NS effectively seeks to prevent Brampton from making this inquiry. Nevertheless, the evidence adduced in the underlying litigation between NS and Brampton is sufficient to show that an actionable claim exists.

1. *The former ICC recognized the risks of implementing a security deposit and warned carriers they must be on firm footing before resorting to this measure.*

When the legality of security deposits first came before the former ICC, the Commission declined to “rule on the lawfulness of any particular security deposit program. Such a decision would necessarily depend on the reasonableness of the terms and conditions of any tariff regulation subsequently enacted.” *Illinois Central Gulf Railroad Company-Security Deposits-Payment Of Demurrage Charges*, 358 I.C.C. 312, 317-318, (1978)(hereinafter “*Security Deposits*”). However, *Security Deposits* recognized the potential for abuse and therefore felt that there were issues which “must be discussed before tariff provisions are published.” *Id.* at 318.

Six of the Commission’s concerns articulated in *Security Deposits* are at issue in this case. First, and foremost, the carrier must be sure that the target of the deposit is actually liable for demurrage. “If there is no obligation to pay demurrage charges, it would be unreasonable to implement the security deposit requirement for failure to pay those charges.” *Id.* Hand in hand with this safeguard, the carrier must “check to ascertain that demurrage computations are accurate prior to imposition of a security deposit.” *Id.* It goes without saying that “there should be no obligation to pay erroneous demurrage bills.” *Id.* Third, recognizing the need to carefully limit the amount of the demurrage, the Commission held, “the amount of the deposit must be established at a level which will insure the collection of anticipated demurrage charges while at the same time avoiding an undue financial burden on shippers subject to the program.” *Id.*, p. 320(emphasis added). Fourth, businesses capable of receiving multiple cars are particularly susceptible to harm from a deposit requirement because the amount on deposit at any one time can quickly escalate. *Id.* *Security Deposits* therefore stressed the carrier’s obligation to promptly return deposits. *Id.*, p. 320, n. 14. The Commission observed that even a two week delay would

impose financial hardship and cautioned that “[r]easonable tariff provisions would have to make an accommodation to avoid this situation.” *Id.* Fifth, the Commission was concerned about “the feasibility of alternative forms of security,” due to the high risk of harm a deposit posed. *Id.*, p. 320. Finally, the Commission cautioned that “the threat of a security deposit could be used to cause a shipper to pay disputed demurrage charges. . . .” *Id.*, p. 320.

Here, as will be set forth more fully below, NS (1) demanded demurrage without any regard to whether Brampton was named as consignee on the bills of lading (Young Depo., p. 74-76); (2) issued and demanded payment of erroneous bills of lading (Pedigo Aff., Ex. A-2); (3) threatened to impose a security deposit unless Brampton paid erroneous bills of lading (Groves Aff., Ex. B-1); (4) imposed a deposit guaranteed to force Brampton to place the full amount in controversy on deposit (NS Tariff 8002(Item 6061)); (5) never identified the basis for the \$1,200 deposit amount (Groves Aff., Ex. B-4; Groves Aff., Ex. B-5); (6) refused to discuss alternative forms of security (Pedigo Aff., Ex. A-4; Pedigo Aff., Ex. A-5); (7) declined to lift the deposit after it learned Brampton raised legitimate defenses to liability (*Id.*); (8) delayed refunding the security deposits Brampton did pay (Mtn., p. 11); and (9) refused to lift the deposit even after the District Court ruled Brampton was not liable for demurrage (Pedigo Aff., Ex. A-10).

2. *NS imposed a deposit upon Brampton without a reasonable basis for doing so.*

The District Court and the Eleventh Circuit have both confirmed that Brampton was not obligated to pay demurrage. Thus, no matter what post-hoc rationalization NS employs, the inescapable fact remains that NS imposed a demurrage deposit on Brampton when Brampton owed no demurrage.⁹ NS’s rush to impose a deposit served no purpose other than to show

⁹ NS discounts the fact that Brampton disputed its responsibility to pay the demurrage by saying the dispute is “no obstacle to the imposition of a deposit requirement” because the “refusal to pay demurrage charges is generally

Brampton the consequences of not paying. NS had the option of proceeding carefully in an effort to avoid the great risk of unnecessarily harming Brampton. NS could have waited until it prevailed in the federal litigation before imposing the deposit. This course of action would have ensured it sought the correct amount from the correct entity. However, NS instead chose to act as judge and jury, unilaterally decreeing Brampton must pay demurrage or suffer the consequences.¹⁰ Brampton indeed suffered the consequences.

Common sense and Board precedent dictate that a deposit requirement is unreasonable if the recipient is not liable for demurrage in the first place. “If there is no obligation to pay demurrage charges, it would be unreasonable to implement the security deposit requirement for failure to pay those charges.” *Security Deposits*, p. 318; *see also, Rail General Exemption Authority-Miscellaneous Agricultural Commodities-Petition of G. & T. Terminal Packaging Co., Inc., Et Al., To Revoke Conrail Exemption*, Ex Parte No. 346 (Sub-No. 14A)(June 13, 1989) p. 3 (hereinafter “*G&T Terminal*”)(observing that while petitioners contested the amount due, they did not dispute they owed some demurrage). Both the District Court and the Eleventh Circuit have ruled that, as a matter of law, Brampton was not liable for demurrage. NS labels these decisions “irrelevant” and “later decided” (Mtn., p. 29); however,

everyone is presumed to know the law for, were the rule otherwise, as John Selden once said, “tis an excuse every man will plead, and no man can tell how to refute him.” Judge-made as well as statutory law is included in the presumption and it also extends to duly promulgated and published regulations of administrative bodies.

treated as a precondition to the imposition of a security deposit requirement.” (Mtn., p. 25, n. 19). This observation misses the fact that it is the refusal to pay legitimate demurrage charges that gives rise to the security deposit.

¹⁰ NS claims “Brampton acknowledges that NS’s unpaid and past-due demurrage bills totaled at least \$57,000 as of July 31, 2007. While NS did demand that amount, among others, Brampton has never “acknowledged” NS’s demurrage bills were accurate.

U.S. v. Lewis, 355 F. Supp. 1132, 1142 (S. D. Ga., 1973)(citations omitted). NS also claims it had insufficient “information available to it at the time it acted” (Mtn., p. 29); however, it was free to make any factual inquiry of Brampton. To the extent NS needed more facts (Mtn., p. 28), it was certainly unreasonable to proceed blindly with the deposit.

NS argues that it cannot be liable for incorrectly instituting a demurrage deposit so long as it “reasonably believed” Brampton was liable. (Mtn., p. 22). NS claims its belief was justified because (1) Brampton was named as consignee on bills of lading, (2) Brampton received the freight for delivery, (3) Brampton never informed NS it was not the true consignee, (4) the cars accrued demurrage, and (5) Brampton refused to pay NS’s demurrage bills. (Mtn., pp. 23-24). Points one and three are irrelevant since NS did not seek demurrage from Brampton based upon anything in the bills of lading and NS does not allege Brampton was listed as consignee in many of those bills of lading. Brampton disputes that the rail cars accrued demurrage as set forth in point four, and NS’s fifth point glosses over the fact that NS was submitting bills it now acknowledges were in error.

Moreover, even assuming the accuracy of these statements, they do nothing more than explain why NS invoiced Brampton for demurrage in the first place. NS apparently took no precautionary steps before escalating the matter to a deposit requirement. In short, NS was overbilling the wrong party for demurrage but takes the position that the party’s failure to pay justifies the deposit. This logic will justify a deposit requirement in all situations.

Nor is it a defense that it was not “clear to NS that Brampton had no responsibility for the underlying demurrage charges.” (Mtn., p. 30). If it must be “clear” to NS that it is wrong, then NS can only be liable if it acted recklessly or with malice. This has never been the rule. Simply put, if a carrier desires to implement a demurrage deposit—an injurious act and the exercise of a

power with great potential for abuse—then it is reasonable to expect the carrier should only do so if it knows the deposit is legitimate. NS ran the risk it was wrong, but proceeded nonetheless and now asks Brampton to bear the brunt of NS overconfidence.

Moreover, NS solely focuses on its subjective knowledge at the moment it implemented the demurrage deposit. However, NS’s actions during the course of the federal court litigation are the subject of this complaint as well. After NS filed suit, Brampton made clear it was not the true consignee and was unaware it may have been incorrectly named as such on some of the bills of lading. (Pedigo Aff., Ex. A-3; Escalante V.S., Ex. B). NS therefore knew Brampton contested the amount demurrage, knew its own calculations had been found inaccurate every time they were subjected to scrutiny, and knew Brampton had a legitimate defense to liability, supported by legal precedent. In short, NS knew its claim against Brampton was questionable and rested on an uncertain foundation. Yet NS refused to lift the deposit requirement while testing the legitimacy of its claim, choosing instead to take punitive measures against Brampton. NS apparently viewed the federal litigation as a mere formality and either disregarded or did not care about the risk that it might unnecessarily harm an innocent party. This willingness to needlessly—and erroneously—injure Brampton was unreasonable and cannot be justified simply because NS could articulate a possible basis for liability.

Moreover, there is certainly evidence NS lacked a “reasonable belief” Brampton was responsible for demurrage when NS instituted the security deposit. NS justifies its actions by arguing that lengthy legal precedent establishes a consignee’s liability for demurrage (Mtn., p. 27) and that the bills of lading identified Brampton as the consignee (Mtn., p. 26). However, NS did not seek demurrage because Brampton was the “named consignee.” Indeed, NS did not even look at the bills of lading when it summarily decided Brampton was liable. (Pedigo Aff.,

Ex. A-1). NS sought demurrage from Brampton solely because Brampton received the freight in question. (*Id.*). There is no legal precedent for that. “Before such transportation-related assessments as [demurrage] charges can be imposed on a party on a prescribed basis there must be some legal foundation for such liability outside the mere fact of handling the goods shipped.” *Middle Atlantic Conference, supra*, at 1118; *see also, Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir.1997) (holding demurrage could not be assessed against a warehouse that was not a consignee or other party to the transportation contract). Thus, putting aside their inaccuracy, the demurrage invoices NS submitted were for all freight delivered to Brampton’s facility, irrespective of whether Brampton was named as consignee in the bill of lading.¹¹ NS knew it was improperly assessing demurrage against Brampton.

Thus, while NS’s motion implies it reasonably imposed the security deposit because Brampton failed to pay demurrage for shipments where it was the “named consignee” (Mtn., p. 23, 28), this is simply not the case. NS took this position for the first time on March 31, 2008, when it amended its federal court complaint to exclude demurrage for shipments where Brampton was not allegedly named consignee. (Pedigo Aff., Ex. A-8; Pedigo Aff., Ex. A-1). Thus, whether Brampton status as an alleged named consignee had nothing to do with NS’s demurrage demand, the deposit, or the lawsuit until March 31, 2008.

Finally, even if the Board were to assume NS considered only Brampton’s consignee status, NS still lacked a reasonable basis to impose the deposit requirement because Brampton’s

¹¹ The way NS sought to collect demurrage from Brampton has been expressly disallowed by law. NS simply re-defined the term “consignee” in its tariff to include “the party entitled to receive the shipment.” (NS 6004-B item 200). However, the ICC and federal courts have already rejected the idea that a carrier can unilaterally define a non-consignee in this manner. *Middle Atlantic Conference, supra*, at 1112 (prohibiting carriers from defining “consignee” in their tariff as “the party to whom the carrier is required by the bill of lading or other instruction, to deliver the shipment. . . .”). This is because “it would be unlawful to attempt unilaterally to impose such liability on a party outside the contract of transportation by means of a tariff.” *Id.*, p. 1123. Therefore, where NS justifies its acts by claiming its tariff permitted it to collect demurrage from Brampton because Brampton was the consignee under its tariff (Mtn., p. 26), this is true only because NS’s tariff defines the term “consignee” more broadly than the law allows.

liability was far from clear. NS claims a “century of consistent authority” (Mtn., p. 28) supported its determination Brampton was liable. To be sure, longstanding precedent exists that the person to whom freight is consigned—the consignee—is liable for demurrage. However, that was not the issue NS faced with respect to Brampton. Instead, as both the Eleventh Circuit and the District Court in the underlying federal court litigation observed, the deciding issue was whether a third party could unilaterally make Brampton the consignee without its consent. This issue had come up several times over the past century, and, at the time NS imposed the deposit requirement on Brampton’s facility, each case had been decided against the carrier. *See Illinois Cent. R. Co. v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 817 (7th Cir. 2003); *Union Pacific railroad Co. v. Carry Transit*, No. 3:04-CV-1095, p. 4 (N.D. Tex. Oct. 27, 2005)(“The Court declines to untether the law of demurrage from its contractual moorings. . .[the] unilateral decision to name a non-party to the transportation contract. . .as a consignee without its consent does not render the non-party liable for demurrage charges.”); *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F. Supp. 880, 884 (N.D. Fla. 1995)(“The unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage.”); *Ingersoll Mill. Mach. Co. v. M/V Bodena*, 829 F.2d 293, 300 (2nd Cir. 1987)(“A carrier. . . may not unilaterally alter a bill of lading so as to bind the shipper without the authorization of the shipper.”); *Western Maryland Ry. Co. v. South African Marine Corp.*, 1987 WL 16153, 4 (S.D. N.Y. 1987)(“[W]e decline to hold, as plaintiff urges, that a connecting ocean carrier is liable for rail demurrage charges as a matter of law merely by virtue of being named by the shipper as the consignee in the rail bills of lading.”); *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154, 157 (D.C. Cal. 1974)(“[W]here, as here, a connecting carrier-consignee is merely named in the railroad bill of lading without either more involvement

on its part, or some culpability for the delay, it cannot be held liable to the railroad for demurrage. To hold otherwise on these facts would be to place a connecting carrier's liability totally within the shipper's control, a result the Court cannot sanction.”); *Missouri, K. & T. Ry. Co. of Texas v. Capital Compress Co.*, 50 Tex. Civ. App. 572, 574, 110 S.W. 1014, 1015 (Tex. Civ. App. 1908). Thus, when NS elected to impose the deposit, there was no legal support for the idea that one could be made consignee against its will.

NS leans heavily on the Third Circuit's decision in *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir.2007), *cert. denied*, --- U.S. ----, 128 S.Ct. 1240, 170 L.Ed.2d 65 (2008). However, that case was decided after NS imposed its security deposit and remains NS's sole legal support to date. At the very minimum, NS was operating at the margins of who might be liable for demurrage and ran the risk its deposit requirement was illegal.

3. *NS could not accurately calculate the amount of demurrage accrued.*

Brampton has also alleged NS also acted unreasonably by imposing a demurrage deposit requirement on Brampton before ascertaining the correct amount of demurrage due. (Comp., ¶ 35). But NS has not established that its demurrage calculations were accurate.

The need for accurate demurrage invoices is clear. Beyond the general need to avoid overbilling, it is unreasonable to tender invoices which overstate the demurrage owed and then, when not paid, to impose a deposit requirement. “Carriers should check to ascertain that demurrage computations are accurate prior to imposition of a security deposit.” *Security Deposits, supra*, at 318. Though it asks the Board to dismiss Brampton's complaint in its entirety, NS devotes little attention to its inability to accurately calculate the amount of demurrage owed. NS first claims Brampton did not “quarrel with NS's calculation of the amount

of demurrage owed.” (Mtn., p. 11). Brampton simply disagrees with this statement. Brampton’s repeated disputes prompted NS to acknowledge all six bills exaggerated the amount owed.¹²

DEMURRAGE CHARGES				
ORIGINAL DEMURRAGE DEMAND DATE	ORIGINAL DEMURRAGE AMOUNT	REVISED BILL DATE	REVISED AMOUNT	DIFFERENCE
05/29/2007	\$8,980.00	07/25/07	\$5,940.00	\$3040.00
04/24/2007	\$30,210.00	07/25/07	\$2,4120.00	\$6,090.00
05/15/2007	\$2,710.00	07/25/07	\$1,320.00	\$1,390.00
06/13/2007	\$15,420.00	07/25/07	\$10,500.00	\$4,920.00
06/20/2007	\$5,390.00	07/25/07	\$1,800.00	\$3,590.00
07/12/2007	\$19,560.00	07/27/07	\$19,260.00	\$300.00

(Groves Aff., Ex. B-2; Groves Aff., Ex. B-3; Pedigo Aff., Ex. A-2). NS does not appear to contest it did not correctly determine the “the precise amount” of demurrage accrued. (Mtn., p. 23). However, it argues this does not affect the reasonableness of its deposit because “the amount of the deposit Brampton was required to make never had anything to do with the total amount of its past-due demurrage charges.” (Mtn., p. 34)(emphasis in original). This argument misses the fact that the same errors which cause the higher total demurrage claim also cause a higher deposit amount. NS calculates demurrage by first determining the total demurrage accrued on each car delivered to Brampton’s facility and then deducting the total credits for returning rail cars early. (Pedigo Aff., Ex. A-7). Thus, if the total demurrage bill is incorrect, it means NS has incorrectly calculated the demurrage accrued on individual cars. This, in turn, affects the deposit amount because NS determines the amount of the deposit requirement “based upon the maximum amount of demurrage charges. . .accrued on any one car during the preceding 12 month period.” (Mtn., p. 20)(emphasis added). If NS cannot correctly determine the amount

¹² The parties ceased communicating at the end of July, 2007. (Groves Aff., Ex. B). Therefore, Brampton did not examine the demurrage bills NS tendered in August.

of demurrage which accrued on the individual cars, it will both get the total amount due wrong and miscalculate the deposit amount.

Second, as NS acknowledges, its deposit program “does take into account the total amount of past-due demurrage charges. . .[by placing] a ceiling on the total amount of funds that a customer must have on deposit that is based on the outstanding past-due balance.” (Mtn., p. 35). Thus, overstating the total amount of demurrage owed raises the “ceiling” of the customer’s total deposit, further depleting the customer’s cash reserves and making it less likely the customer who handles multiple cars can pay the deposit. Putting aside the coercive effect of threatening a deposit over demurrage which has not actually accrued, the effect of overbilling demurrage can have a particularly severe effect where it both increases the per-car deposit amount and raises the cap on how much money the customer will have on deposit at any one time.

Finally, NS cannot claim its deposit amount was reasonable where it has not established that any single car did in fact incur \$1,200 in demurrage.

4. *NS’s deposit amount is not limited to protecting itself against anticipated demurrage.*

Assuming it has demanded the correct amount of demurrage from the party obligated to pay it, NS’s deposit must be “established at a level which will insure the collection of anticipated demurrage charges while at the same time avoiding an undue financial burden on shippers subject to the program.” *Security Deposits*, supra, at 320. NS’s deposit is not based upon the amount of demurrage which might reasonably accrue. It does not calculate the deposit based upon the average demurrage each car accrued, or the average monthly demurrage bill. Instead, NS demands that the deposit for each car delivered match the maximum demurrage which

accrued on any single car in the last twelve months, even if that single car's demurrage was an aberration. (Tariff 8002, Item 6061(c)), By taking the most demurrage accrued on any single car within the past twelve months and extrapolating it to every car delivered to the customer—even where the customer is not the consignee—NS requires a deposit far in excess of the demurrage which might actually accrue. For example, when it imposed the deposit, NS claimed that the most demurrage Brampton had accrued in a single month was \$24,120, (Pedigo Aff., Ex. A-2)—and that is including demurrage for which Brampton was not the named consignee.¹³ Yet NS set the deposit requirement at a level where Brampton had to pay \$6,000 per day. There is thus no connection between the amount of demurrage NS anticipated Brampton might accrue and the amount of the deposit.¹⁴

NS claims this problem is remedied by its decision to cap the total amount on deposit at any one time at the total demurrage owed. This protection is illusory. First, NS has artificially inflated the cap by both submitting inaccurate demurrage invoices and demanding demurrage for which Brampton is not the named consignee (assuming Brampton were otherwise liable). Moreover, forcing the customer to deposit the total amount in controversy goes far beyond the “level which will insure the collection of anticipated demurrage charges” which might reasonably accrue before the deposit is returned. *Security Deposits*, p. 320. Rather it is an inappropriate self-help measure.¹⁵ *Railroad Salvage & Restoration, Inc., And G.F. Weideman*

¹³ NS's average monthly demurrage bill to Brampton was closer to \$10,000.

¹⁴ NS likens its deposit to the \$50,000 deposit in *G. & T. Terminal*. (Mtn., p. 37). However, the amount of demurrage allegedly due was in excess of \$2 million and the petitioner did not dispute that they owed a substantial portion of it. *Id.*, p. 3. Moreover, unlike here, the carrier “presented [the petitioner] with the lawful option of providing a letter of credit (in a reasonable amount) to secure future D/D charges. . . .” Finally, the Commission did not, as NS implies, bless the \$50,000 deposit as reasonable. Instead, it simply denied the request for an injunction and promised to “fully examine the lawfulness of the entire Rule 10 process and the other disputes when we consider and rule on the pending petition for revocation. . . .” *Id.*

¹⁵ NS defends its deposit by distinguishing it from one criticized in *Weideman*. However, the only difference is the amount of time it takes for the carrier to get the customer to deposit the full amount in controversy. *Weideman* required the customer to deposit it immediately whereas NS takes several days. The similarities far outweigh the

International, Inc. -- Petition for Investigation and for Emergency Relief Under 49 U.S.C.

721(b)(4) -- Security Deposit for Demurrage Charges, Missouri & Northern Arkansas Railroad Company, Inc., STB Docket No. 42107 (served June 30, 2008) p. 1 (hereinafter "Weideman")

5. *NS used its deposit in a coercive manner.*

From the beginning, NS used its deposit as economic leverage, designed to force Brampton to capitulate and pay a disputed, erroneous demurrage bill. First, on a system-wide level, NS sought to accomplish this result by demanding an unreasonably large deposit amount. NS's deposit rules are designed to ensure the customer must deposit the full amount of the disputed demurrage in order to receive rail freight. As described above, NS does not set the deposit amount at any level reasonably related to the customer's past demurrage charges. NS's deposit required Brampton to deposit \$120,000 over a four week period,¹⁶ approximately five times the highest amount NS alleged Brampton had incurred in a month at the time it instituted the security deposit. By including demurrage for which Brampton was not the named consignee in its demand, NS was able to raise the "ceiling" on the deposit to \$133,000.

Next, NS ensured Brampton would be forced to deposit the full amount by delaying any refund. Using NS's figures, NS waited an average of 43 days to refund Brampton's deposit, but in one instance refused to refund it for as long as 65 days. (Mtn., p. 11). *Security Deposits* recognized a "large deposit could create considerable difficulties for small shippers with limited resources, especially when multicar movements are involved." *Security Deposits*, p. 320. The Commission therefore stressed the carrier's duty to promptly return deposits so that the depositor was not forced to leave large sums with the carrier. *Id.*, p. 320, n. 14. The Commission observed

differences: both carriers ultimately required "payment of the full amount at issue in those proceedings as a precondition for continued rail service" where the demurrage amount was disputed, being litigated, "and will be resolved in due course." *Weideman*, at 1.

¹⁶ At \$1,200 per railcar, five railcars per day, five business days per week, for a four week period, Brampton would have to deposit \$120,000.

that even a two week delay would impose financial hardship and cautioned that “[r]easonable tariff provisions would have to make an accommodation to avoid this situation.” *Id.* Here, by its own accounting, NS held deposits for well over a month (Mtn., p. 21), ensuring Brampton would feel just such a financial hardship.

Next, on a more individual level, NS did use the deposit as a collection tool. NS flatly refused to even discuss alternative security arrangements. (Pedigo Aff., Ex. A-4; Pedigo Aff., Ex. A-5). The reasonableness of a carrier’s security deposit program depends, in part, on “the feasibility of alternative forms of security. . . .” *Security Deposits*, p. 320. NS’s tariff does authorize it to lift the deposit if Brampton can place itself on NS’s “credit list” (Tariff 6160(f)(1)). However, this provision is entirely subjective and does not commit NS to actually offer an alternative form of security. Hence NS was free to, and did, deny Brampton “credit.” NS claims “Brampton could have, but did not, avail itself of the option of establishing credit with NS.”¹⁷ (Mtn., p. 36). This statement ignores the fact that Brampton unsuccessfully tried to enter into a dialogue on this topic, but NS refused to even discuss the matter. Instead, NS bluntly informed Brampton that NS would resume service only if Brampton paid the deposit.

Perhaps most telling is NS’s refusal to lift the deposit following the District Court’s ruling that Brampton was not liable for demurrage. This order swept away any conceivable basis for NS’s deposit. (Pedigo Aff., Ex. A-13). However, NS treated the District Court’s order with contempt and refused to recognize it even though it was legally binding. (Pedigo Aff., Ex. A-10). NS’s willingness to keep the deposit in place with no legal basis underscores the value NS placed on the coercive leverage it derived from the deposit. NS made it clear: Brampton could

¹⁷ NS fails to provide a record cite for this assertion.

either pay the full amount of contested demurrage through the deposit or pay the alleged demurrage itself and remove the deposit requirement.

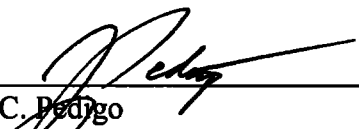
Conclusion

For the foregoing reasons, Brampton requests the Board deny NS's motion to dismiss.

This 30th day of March, 2010.

ELLIS, PAINTER, RATTERREE & ADAMS LLP

By:



Jason C. Pedigo
Georgia State Bar No. 140989
Attorneys for Complainant

Post Office Box 9946
Savannah, Georgia 31412
(912) 233-9700
jpeditgo@epa-law.com


CERTIFICATE OF SERVICE

I, Jason C. Pedigo, certify that I have this day served a copy of the Complaint upon all parties of record in this proceeding by UPS overnight mail.

David L. Meyer
Karen E. Escalante
Morrison & Foerster LP
2000 Pennsylvania Avenue N.W.
Suite 6000
Washington, DC 20006

James A. Hixon
John M. Scheib
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, Virginia 23510

So certified this 30th day of March, 2010.



Jason C. Pedigo
Georgia Bar Number 140989
Attorney for Complainant

Post Office Box 9946
Savannah, Georgia 31412
(912) 233-9700

STATE OF GEORGIA
COUNTY OF CHATHAM

)
)

AFFIDAVIT

PERSONALLY appeared before the undersigned officer duly authorized to administer oaths, JASON PEDIGO, who, upon first being duly sworn on oath, deposes and states as follows:

"I am over the age of 18, competent to testify on my own behalf, and the following is based upon my personal knowledge.

Exhibit A-1 to my affidavit is a true and correct copy of pages 74-77 of the deposition of Paul C. Young, Norfolk Southern Railway Corporation's corporate representative pursuant to Federal Rule of Civil Procedure 30(b)(6), taken April 24, 2008 in case no. 4:07-cv-0155 in the U.S. District Court for the Southern District of Georgia.

Exhibit A-2 to my affidavit is an accurate copy of a Statement Norfolk Southern Railway Company produced in discovery in case no. 4:07-cv-0155 in the U.S. District Court for the Southern District of Georgia.

Exhibit A-3 to my affidavit is an accurate copy of a letter I sent to Curt Thomas, an attorney representing Norfolk Southern Railway Company, on December 11, 2007.

Exhibit A-4 to my affidavit is an accurate copy of an email I received from Chad Mountain, an attorney representing Norfolk Southern Railway Company, on January 15, 2008.

Exhibit A-5 to my affidavit is an accurate copy of an email I received from Chad Mountain on January 16, 2008.

Exhibit A-6 to my affidavit is an accurate copy of the Complaint filed in case no. 4:07-cv-0155 in the U.S. District Court for the Southern District of Georgia, Savannah Division, on October 11, 2007.

Exhibit A-7 to my affidavit is an accurate copy of the Brief of Plaintiff in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross Motion for Partial Summary Judgment Norfolk Southern Railway Company filed in case no. 4:07-cv-0155 in the U.S. District Court for the Southern District of Georgia, Savannah Division, on March 13, 2008.

Exhibit A-8 to my affidavit is an accurate copy of the Amended Complaint Norfolk Southern Railway Company filed in case no. 4:07-cv-0155 in the U.S. District Court for the Southern District of Georgia, Savannah Division, on March 31, 2008.

Exhibit A-9 to my affidavit is an accurate copy of a letter I sent to Paul Keenan, an attorney representing Norfolk Southern Railway Company, on September 19, 2008.

Exhibit A-10 to my affidavit is an accurate copy of a letter I received from Paul Keenan on September 23, 2008.

Exhibit A-11 to my affidavit is an accurate copy of Defendant's Motion to Enforce Judgment filed in case no. 4:07-cv-0155 in the U.S. District Court for the Southern District of Georgia, Savannah Division, on March 16, 2009.

Exhibit A-12 to my affidavit is an accurate copy of the District Court's Order entered March 19, 2009, in case no. 4:07-cv-0155 in the U.S. District Court for the Southern District of Georgia, Savannah Division.

Exhibit A-13 to my affidavit is an accurate copy of a letter I received from Paul Keenan on March 20, 2009.


JASON PEDIGO

Sworn to and subscribed before me
this 30th day of March, 2009.


Notary Public

My commission expires: 4/22/13
(NOTARIAL SEAL)



A-1

IN THE MATTER OF:

NORFOLK SOUTHERN RAILWAY

VS.

BRAMPTON ENTERPRISES, LLC, ET AL.

DEPOSITION OF: PAUL C. YOUNG

TAKEN ON: APRIL 24, 2008

***CONDENSED/ INDEX/
EXHIBITS***



McKee Court Reporting, Inc.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF GEORGIA
 SAVANNAH DIVISION

3 NORFOLK SOUTHERN RAILWAY,)
)
4 Plaintiff,)
)
5 vs.) CIVIL ACTION
) NO. 4:07-CV-0155
6 BRAMPTON ENTERPRISES, LLC,)
 d/b/a SAVANNAH RE-LOAD,)
7)
 Defendant.)
8 -----
9
10
11 Deposition of PAUL C. YOUNG, taken by counsel
12 for the Plaintiff, pursuant to notice and by agreement
13 of counsel, under the Federal Rules of Civil
14 Procedure, reported by Annette Pacheco, CSR, RPR, RMR,
15 B-2153, in the offices of Oliver, Maner & Gray, 218
16 West State Street, Savannah, Georgia, on Thursday,
17 April 24, 2008, commencing at 9:08 a.m.
18
19
20
21
22

Transcript Prepared By:

23 McKEE COURT REPORTING, INC.
24 P. O. Box 9092
 Savannah, Georgia 31401
25 (912) 232-8322

PAUL C. YOUNG - EXAMINATION BY MR. PEDIGO

<p style="text-align: right;">Page 74</p> <p>1 Q. Okay. I'll just represent to you that 2 that's what Norfolk Southern has said in discovery 3 responses. 4 A. Okay. 5 Q. Are you aware of any oral agreement 6 regarding the payment of demurrage? 7 A. I mean, I'm personally not aware of one. 8 Q. Okay. So, as I have always understood 9 Norfolk Southern's position, Savannah Re-Load is 10 liable for demurrage -- well, you tell me why is 11 Savannah Re-Load liable for demurrage? 12 MR. MOUNTAIN: Objection. 13 BY MR. PEDIGO: 14 Q. I mean, what's Norfolk Southern's 15 position? 16 A. In accordance with the tariff, they 17 received the rail cars. 18 Q. Okay. 19 A. So, we billed them for the demurrage. 20 Q. Just that one basis; right? 21 A. Yes. 22 Q. Okay. So, if there's one basis for 23 liability, and Savannah Re-Load has not made any 24 payments for demurrage, and it's just a 25 straightforward mathematical calculation as to what</p>	<p style="text-align: right;">Page 76</p> <p>1 A. Correct. 2 Q. So, why was the original complaint 3 filed without regard to whether Savannah Re-Load was 4 named as a consignee? 5 MR. MOUNTAIN: Objection. 6 A. We billed the demurrage based on who's 7 receiving the rail car. 8 BY MR. PEDIGO: 9 Q. Without looking at who's the consignee? 10 A. True. 11 Q. So, you're billing for rail car 12 shipments that the recipient's not liable for? 13 MR. MOUNTAIN: Objection. 14 A. I can't -- 15 BY MR. PEDIGO: 16 Q. All right. Let me ask. You were 17 billing for shipments that you're not claiming 18 Savannah Re-Load owes you now? 19 A. The tariff allows me to bill the 20 receiver of the rail car. 21 Q. All right. 22 A. The tariff allows me to bill the 23 receiver for the demurrage. 24 Q. I'm going to hand you NS 1496 through 25 NS 1517.</p>
<p style="text-align: right;">Page 75</p> <p>1 the demurrage amount is, where did this \$133,000 2 amount come from in the original complaint and why is 3 it now reduced to \$70,680? 4 A. The \$133,080 is the outstanding 5 demurrage balance for all the shipments received and 6 unloaded by Savannah Re-Load during the billing 7 period. 8 Q. Which is what NS 5054 through 5058 is; 9 right? 10 A. No. 11 Q. Okay. What's the difference? 12 A. I'll say it one more time. 5054 through 13 5058 are the demurrage records for those shipments 14 where Savannah Re-Load was named as the consignee on 15 the bill of lading. 16 Q. Okay. So, the difference is the amount 17 claimed in the original complaint was for all 18 shipments irrespective of whether Savannah Re-Load 19 was named as a consignee on the bill of lading? 20 A. Correct. 21 Q. So, am I correct in understanding that 22 the basis of Norfolk Southern's claim is that we 23 received these shipments and were named as consignee 24 in the bill of lading; correct? I mean, that's how 25 we got to this amended amount of \$70,000; right?</p>	<p style="text-align: right;">Page 77</p> <p>1 A. Okay. 2 Q. And tell me where the tariff says that 3 you billed the person who receives the shipment? 4 A. Okay. In item 200, glossary of terms, 5 it identifies the consignee as the party to whom a 6 shipment is consigned or the party entitled to receive 7 the shipment. 8 Okay. And then in item 500, paragraph 9 C, it says, all railroad controlled cars held for or 10 by consignors or consignees for any purpose are 11 subject to demurrage rules and charges in this 12 section. 13 Q. Okay. And, so, in the amount, this 14 \$133,000 amount, you were billing Savannah Re-Load 15 for shipments in which they were not named as 16 consignee; correct? 17 A. It would be for all shipments where they 18 were named as consignee or may not have been named as 19 consignee. 20 Q. Okay. And it's your position that your 21 interpretation of this tariff is that whether 22 Savannah Re-Load is named as consignee is irrelevant? 23 A. My basis for the billing is, is based on 24 the definition of consignee, which is the party to 25 whom a shipment is consigned or the party entitled to</p>

CERTIFICATE

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2

3 GEORGIA:

4 CHATHAM COUNTY:

5

6 I, Annette Pacheco, Registered Professional
7 Reporter and Certified Shorthand Reporter for the
8 State of Georgia, do hereby certify:

9 That the foregoing deposition was taken before me
10 on the date and at the time and location stated on
11 Page 1 of this transcript; that the witness was duly
12 sworn to testify to the truth, the whole truth, and
13 nothing but the truth; that the testimony of the
14 witness and all objections made at the time of the
15 examination were recorded stenographically by me and
16 were thereafter transcribed by computer-aided
17 transcription; that the foregoing deposition as typed
18 is a true, accurate, and complete record of the
19 testimony of the witness and of all objections made at
20 the time of the examination.

21 I further certify that I am neither related to
22 nor counsel for any party to the cause pending or
23 interested in the events thereof.

24

25

1 Witness my hand, I have hereunto affixed my
2 official seal this 29th day of April, 2008, at
3 Savannah, Chatham County, Georgia.

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Annette Pacheco

9

ANNETTE PACHECO, CSR, RPR, RMR

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B-2153

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A-2

**STATEMENT OF CHARGES DUE NORFOLK SOUTHERN RAILWAY COMPANY
FOR THE ACCOUNT OF SAVANNAH RELOAD LLC
AS COVERED BY BILLS LISTED BELOW:**

**UN
CUSTOMER NUMBER 00110580029**

SAVANNAH, GA

Freight Bill	FB Date	Waybill	WB Date	Amt Billed	Amt Paid	Correction	Net Amt. Due
4072226850	5/29/2007	901582	3/12/2007	\$8,980.00	\$0.00	(\$3,040.00)	\$5,940.00
4102200217	4/24/2007	901654	4/11/2007	\$30,210.00	\$0.00	(\$6,090.00)	\$24,120.00
4131173691	5/15/2007	901631	5/10/2007	\$2,710.00	\$0.00	(\$1,390.00)	\$1,320.00
4164189299	6/13/2007	901607	6/12/2007	\$15,420.00	\$0.00	(\$4,920.00)	\$10,500.00
4164189524	6/20/2007	901630	6/12/2007	\$5,390.00	\$0.00	(\$3,590.00)	\$1,800.00
4193164412	7/12/2007	901574	7/11/2007	\$19,560.00	\$0.00	(\$300.00)	\$19,260.00
4225604106	8/13/2007	901555	8/10/2007	\$49,020.00	\$0.00	\$0.00	\$49,020.00
4229117290	8/21/2007	658191	8/15/2007	\$1,020.00	\$0.00	\$0.00	\$1,020.00
4229117305	8/21/2007	658192	8/15/2007	\$1,200.00	\$0.00	\$0.00	\$1,200.00
4229117313	8/21/2007	658193	8/15/2007	\$1,080.00	\$0.00	\$0.00	\$1,080.00
4229117321	8/21/2007	658194	8/15/2007	\$1,200.00	\$0.00	\$0.00	\$1,200.00
4229117339	8/21/2007	658195	8/15/2007	\$1,080.00	\$0.00	\$0.00	\$1,080.00
4229117347	8/21/2007	658196	8/15/2007	\$1,080.00	\$0.00	\$0.00	\$1,080.00
4229117355	8/21/2007	658197	8/15/2007	\$1,080.00	\$0.00	\$0.00	\$1,080.00
4229117363	8/21/2007	658198	8/15/2007	\$1,080.00	\$0.00	\$0.00	\$1,080.00
4229117371	8/21/2007	658199	8/15/2007	\$1,200.00	\$0.00	\$0.00	\$1,200.00
4229117389	8/21/2007	658200	8/15/2007	\$1,080.00	\$0.00	\$0.00	\$1,080.00
4229117397	8/21/2007	658201	8/15/2007	\$1,080.00	\$0.00	\$0.00	\$1,080.00
4229117402	8/21/2007	658202	8/15/2007	\$1,080.00	\$0.00	\$0.00	\$1,080.00
4229117410	8/21/2007	658204	8/15/2007	\$1,080.00	\$0.00	\$0.00	\$1,080.00
4229117428	8/21/2007	658206	8/15/2007	\$1,080.00	\$0.00	\$0.00	\$1,080.00
4229117436	8/21/2007	658207	8/15/2007	\$1,140.00	\$0.00	\$0.00	\$1,140.00
4229117444	8/21/2007	658208	8/15/2007	\$1,140.00	\$0.00	\$0.00	\$1,140.00
4229117452	8/21/2007	658209	8/15/2007	\$1,140.00	\$0.00	\$0.00	\$1,140.00
4229117460	8/21/2007	658210	8/15/2007	\$1,140.00	\$0.00	\$0.00	\$1,140.00
4229117478	8/21/2007	658211	8/15/2007	\$1,140.00	\$0.00	\$0.00	\$1,140.00
				\$152,410.00	\$0.00	(\$19,330.00)	\$133,080.00

A-3

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December 11, 2007

VIA EMAIL AND FIRST-CLASS MAIL

J. Curt Thomas, Esq.
Brennan and Wasden LLP
Post Office Box 8047
Savannah, Georgia 31412

RE: *Norfolk Southern Railway Co. v. Billy Groves and Savannah Re-Load*
Southern District of Georgia, Civil Action No. CV407155
Our File No. 5578-1

Dear Curt:

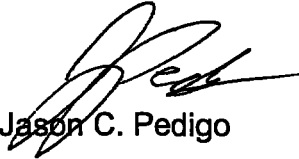
Thank you for providing the bills of lading and other documents prior to our Rule 26 Conference on November 29, 2007. After going through those documents, I still do not see any basis for Norfolk Southern to claim that Savannah Re-Load or Brampton Enterprises, LLC is liable for demurrage. Nor did they contractually assume this liability. My review of the correspondence between the two entities reveals that Savannah Re-Load has disputed these charges from the beginning and I do not see where Norfolk Southern has ever set forth the basis for its liability.

I understand that some bills of lading list Savannah Re-Load as the consignee; however, I believe it is apparent that it Savannah Re-Load was never the buyer or recipient of these shipments. The presence of an "ultimate consignee" on some of those bills of lading supports this fact. Moreover, Savannah Re-Load did not draft these bills of lading nor consent to this designation. I am unaware of any law or statute permitting someone else to unilaterally subject Savannah Re-Load to these demurrage charges. Regardless, I would like to know if, following our previous conversations, Norfolk Southern still intends to take the position that Brampton Enterprises, LLC is liable for this demurrage. If so, I would appreciate it if you would please set forth the precise reasons why so that we may aggressively pursue discovery on that issue. No doubt we both would like to resolve this dispute as quickly and efficiently as possible.

Finally, at the Rule 26 conference, we discussed the possibility of meeting with Chad and possibly a Norfolk Southern representative to establish some type of agreement regarding "future" business. Everyone seemed in agreement that it was best for all sides if, present dispute notwithstanding, we could work out an arrangement so that Savannah Re-Load and Norfolk Southern could resume working together in such a way that this issue would not reoccur. Chad wanted to obtain our Rule 26 disclosures before arranging this conference and I am therefore sending them to you today. You will receive a service copy via email. Please let me know when you would like to schedule this teleconference; I am pretty flexible all this week and I believe Jim Austin is as well. I look forward to hearing from you.

I remain,

Very truly yours,



Jason C. Pedigo

cc: Mr. Billy Groves (via email)
Mr. Robert Groves (via email)
James K. Austin, Esq. (via email)

A-4

Jason Pedigo

From: Chad Mountain [CMountain@freightlaw.net]

Sent: Tuesday, January 15, 2008 4:52 PM

To: Jason Pedigo

Subject: NS v. Savannah Re-Load

Jason,

In response to your client's interest in resuming service with NS while this matter is outstanding, NS is willing to resume service provided that Savannah pay a demurrage deposit of \$1,200 per railcar pursuant to NS 8002-A, Item 6160. Also, NS responses to your client's discovery requests will be forwarded shortly.

Please advise if these terms are acceptable.

Chad

Chad D. Mountain
Keenan Cohen & Howard PC
One Pitcairn Place
Suite 2400
165 Township Line Road
Jenkintown, PA 19046
{Direct} 215-609-1107
{Fax} 215-609-1117
cmountain@freightlaw.net

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A-5

Jason Pedigo

From: Chad Mountain [CMountain@freightlaw.net]

Sent: Wednesday, January 16, 2008 10:01 AM

To: Jason Pedigo

Subject: RE: NS v. Savannah Re-Load

Jason,

NS demand remains firm.

Chad D. Mountain
Keenan Cohen & Howard PC
One Pitcairn Place
Suite 2400
165 Township Line Road
Jenkintown, PA 19046
{Direct} 215-609-1107
{Fax} 215-609-1117
cmountain@freightlaw.net

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From: Jason Pedigo [mailto:JPedigo@EPRA-Law.com]

Sent: Tuesday, January 15, 2008 5:49 PM

To: Chad Mountain

Subject: RE: NS v. Savannah Re-Load

Chad,

I understand NS made this demand before initiating litigation. As an initial matter, in light of the fact that my clients do not contract with NS, I question whether they fall within this tariff. Respectfully, we have been asking for a meeting with NS to discuss whether the two companies can resume business without this requirement; NS reiterating this demand does not address our inquiry about a meeting. Is NS willing to meet in order to discuss whether the two companies can resume business in a manner that is acceptable to both? Please let me know and please feel free to contact me with any questions.

I appreciate the information regarding the discovery responses.

Jason

From: Chad Mountain [mailto:CMountain@freightlaw.net]

Sent: Tuesday, January 15, 2008 4:52 PM

To: Jason Pedigo

Subject: NS v. Savannah Re-Load

Jason,

In response to your client's interest in resuming service with NS while this matter is outstanding, NS is willing to resume service provided that Savannah pay a demurrage deposit of \$1,200 per railcar pursuant to NS 8002-A, Item 6160. Also, NS responses to your client's discovery requests will be forwarded

3/29/2010

shortly.

Please advise if these terms are acceptable.

Chad

Chad D. Mountain
Keenan Cohen & Howard PC
One Pitcairn Place
Suite 2400
165 Township Line Road
Jenkintown, PA 19046
{Direct} 215-609-1107
{Fax} 215-609-1117
cmountain@freightlaw.net

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3/29/2010

A-6

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY
COMPANY

Three Commercial Place
Norfolk, VA 23510-2191

Plaintiff,

v.

BILLY GROVES individually and d/b/a
SAVANNAH RE-LOAD
139 Brampton Road
Garden City, GA 31408

And

SAVANNAH RE-LOAD
139 Brampton Road
Garden City, GA 31408

Defendants.

CIVIL ACTION

NO. **CV407 155**

FILED
U.S. DISTRICT COURT
SAVANNAH DIV.
2007 OCT 11 AM 10:51
ERK
SO. DIST. OF GA.

COMPLAINT

Jurisdiction

1. Jurisdiction in this matter is based upon 28 U.S.C. § 1337 inasmuch as this is a cause of action arising under the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.*

2. Jurisdiction also exists under 28 U.S.C. § 1332 because, as more fully described in Paragraphs 4-5, *infra*, the plaintiff and defendants are citizens of different states, and the amount at issue exceeds jurisdictional requirements.

Venue

3. Venue properly lies in this judicial district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the cause of action set forth in this Complaint occurred within this judicial district, and defendants reside within this judicial district.

Parties

4. Plaintiff Norfolk Southern Railway Company ("Norfolk Southern") is a Virginia corporation, having its principal place of business in Norfolk, Virginia. Norfolk Southern operates as an interstate rail carrier subject to the jurisdiction of the United States Surface Transportation Board, and is governed by the provisions of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

5. Upon information and belief, defendant Billy Groves is the owner of Savannah Re-Load ("SRL") and does business as SRL.

6. Upon information and belief, defendant SRL is a privately held company in the State of Georgia and maintains its principal place of business at 139 Brampton Road, Garden City, Georgia 31408.

CAUSE OF ACTION

7. The subject matter of this action stems from rail car demurrage charges assessed pursuant to the provisions of 49 U.S.C. § 10746 relating to freight car use and distribution.

8. Beginning in or about March 2007 and continuing through August 2007, defendants incurred \$133,080.00 in railcar demurrage charges, all of said charges due and owing to Norfolk Southern.

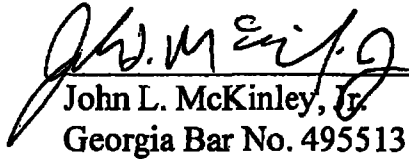
9. Norfolk Southern submitted invoices to SRL for the demurrage charges that defendants have incurred from on or about March 2007 through August 2007.

10. The assessed demurrage charges were determined and made applicable pursuant to tariffs, rules and rates promulgated and published in accordance with 49 U.S.C. § 10746.

11. Although demand has been made for payment of the aforementioned charges, defendants have failed and/or refused to pay.

WHEREFORE, plaintiff Norfolk Southern Railway Company respectfully demands that judgment be entered in its favor and against defendants in the amount of \$133,080.00 for demurrage charges together with costs, prejudgment interest, and such other relief as the Court may allow.

Respectfully submitted this 10th day of October, 2007.


John L. McKinley, Jr.
Georgia Bar No. 495513

MOZLEY, FINLAYSON & LOGGINS LLP
One Premier Plaza, Suite 900
5605 Glenridge Drive
Atlanta, GA 30342-1386
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(404) 250-9355 (facsimile)

OF COUNSEL (pro hac application to be filed):

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165 Township Line Road, Suite 2400
Jenkintown, PA 19046
(215) 609-1110 (telephone)
(215) 609-1117 (facsimile)

Attorneys for Plaintiff
Norfolk Southern Railway Company

A-7

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION**

NORFOLK SOUTHERN RAILWAY CO.

Plaintiff,

v.

BRAMPTON ENTERPRISES, LLC, D/B/A
SAVANNAH RE-LOAD, LLC

Defendant.

CIVIL ACTION

NO. 4:07-cv-0155

**BRIEF OF PLAINTIFF IN OPPOSITION TO DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Norfolk Southern Railway Company ("Norfolk Southern"), by and through its undersigned attorneys, hereby submits the following Brief in Opposition to Defendant Brampton Enterprises, LLC's, d/b/a Savannah Re-Load, LLC ("Savannah") Motion for Summary Judgment, and in support of Plaintiff's Cross-Motion for Partial Summary Judgment.

I. Statement of Facts

Pursuant to voluminous bills of lading and/or electronic bills of lading data that were issued in this case, Norfolk Southern transported freight on behalf of various shippers which was consigned for delivery to Savannah. See Affidavit of Paul C. Young, a true and correct copy of which is attached as Exhibit "A," ¶ 3. Upon delivery of the freight in rail cars to Savannah, Savannah failed to unload and return the rail cars to Norfolk Southern within the free time permitted by the controlling tariff (NS 6004-B), resulting in the accrual of rail car demurrage charges due and owing by Savannah. See Exhibit "A," ¶ 6. As described more extensively below, demurrage is a charge for detaining a freight car beyond the time permitted by tariff.

Pursuant to the controlling tariff, Savannah was allowed two (2) days to unload freight without incurring demurrage charges. See Exhibit "A," ¶ 7. At the end of each month, a customer's total demurrage days are netted against total credits for returning rail cars early. If total demurrage days exceed credits, those days are charged at the daily rate for demurrage as published in NS 6004. See Exhibit "A," ¶ 8. Here, Savannah's demurrage days exceeded the number of credit days. See Exhibit "A," ¶¶ 9-10. After the charges were incurred, Norfolk Southern sought payment from Savannah and invoiced Savannah for the accrued demurrage. See id. Norfolk Southern sought payment from Savannah because the bills of lading and/or electronic bill of lading data (attached to the referenced Affidavit) identify Savannah as the consignee to whom delivery must be made. See Exhibit "A," ¶ 4.

After Norfolk Southern demanded payment from Savannah for the demurrage charges, representatives from Savannah disputed the manner in which the demurrage charges were calculated, but never disputed that it was the consignee that had responsibility to pay the demurrage charges. See Exhibit "A," ¶ 5. Norfolk Southern responded to Savannah's demurrage disputes, and after failing to receive payment from Savannah, Norfolk Southern filed this lawsuit seeking payment for the incurred demurrage charges. See Exhibit "A," ¶ 11.

Savannah now alleges that it was not the actual consignee, and therefore, it cannot be liable to Norfolk Southern for the demurrage charges. However, as established by the bills of lading and/or electronic bill of lading data, attached to the referenced Affidavit, Savannah is indeed the sole named consignee for purposes of the demurrage charges. See Exhibit "A," ¶ 4. Just as in the Third Circuit's decision in CSX Transp. Co. v. Novolog Bucks County, 502 F.3d 247, 258-259 (3d Cir. 2007) *cert. denied*, 2008 U.S. LEXIS 1265 (U.S. 2008), Savannah is liable, as a matter of law, to Norfolk Southern for the demurrage charges in question because (1)

Savannah is identified as a consignee on the bills of lading; (2) Savannah accepted delivery of the rail cars and the freight; and (3) Savannah did not notify Norfolk Southern of its agent status. Accordingly, this Court must deny Savannah's motion for summary judgment as a matter of law and must, in turn, grant Norfolk Southern's cross-motion for partial summary judgment finding that Savannah is liable for the demurrage charges.

II. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." See Fed. R. Civ. P. 56(e).

An issue is genuine if the fact finder could reasonably return a verdict in favor of the non-moving party with respect to that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material only if the dispute over the facts "might affect the outcome of the suit under the governing law." Id. In making this determination, the Court must view the facts in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences drawn from those facts. See id.

III. Argument

A. Purpose of Demurrage

As a supplement to Savannah's overview of demurrage as outlined in its Brief in Support of its Motion for Summary Judgment ("Brief"), federal law specifically mandates that rail carriers to compute and impose demurrage charges in connection with the handling and usage of rail cars. See 49 U.S.C. § 10746. A rail carrier is under a duty to collect, and the shipper or consignee is under a duty to pay demurrage charges. See St. Louis, Southwestern Railway Co. v. Mays, 177 F. Supp. 182 (E.D. Ark. 1959).

The purpose of demurrage is to encourage the prompt return of freight cars to service so as to guarantee the steady flow of rail freight. See Pennsylvania R. Co. v. Kittanning Iron & Steel Mfg. Co., 253 U.S. 319, 323 (1920) (purpose of demurrage charges is "to promote [railcar] efficiency by penalizing undue detention of cars."). Congress' concern with ensuring that rail cars be available for transportation and not sidelined or improperly used as storage facilities is reflected in 49 U.S.C. § 10746, which provides that rail carriers "shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to--(1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property." CSX Transp. Co. v. Novolog Bucks County, 502 F.3d 247, 258-259 (3d Cir. 2007) *cert. denied*, 2008 U.S. LEXIS 1265 (U.S. 2008).

B. As a consignee Savannah is liable for demurrage

As correctly stated in Savannah's Brief (pp. 4-7), in order for Savannah to be liable for demurrage charges, Savannah must be listed as a consignee in order for Norfolk Southern to recover the demurrage charges at issue. Savannah's recitation of the Middle Atlantic Conference case is not helpful to this Court because, as Savannah appropriately points out, in Middle

Atlantic Conference, the bills of lading at issue in that case did not identify the defendant as a consignee. See Brief, p. 5. Here, the bills of lading and/or electronic bill of lading data, attached to the referenced Affidavit, identify Savannah as the consignee. See Exhibit "A," ¶ 4. Thus, the Middle Atlantic Conference case is of no relevance.

The court in Middle Atlantic Conference held that a tariff unilaterally expanding the definition of "consignee" to include any person to whom the bill of lading instructed the carrier to deliver the shipment, but specifically explained that the tariff was invalid because it attempted to impose liability on a party who was not a party to the transportation contract, "i.e., a person not named in the bills of lading as consignor or consignee." See Novolog, at 261 citing Middle Atlantic Conference v. United States, 353 F. Supp. 1109, 1112 (D.C. 1972). Thus, the Court in Middle Atlantic Conference held that a tariff may not impose liability simply because of the "mere fact of handling the goods shipped," but that liability can only be imposed upon those named in the bill of lading. See id. citing Middle Atlantic Conference at 1118. Because Savannah is listed as the consignee on bills of lading and/or electronic bill of lading data attached to the referenced Affidavit (Exhibit "A, ¶ 4"), Norfolk Southern can appropriately demand payment for demurrage charges incurred by Savannah. Furthermore, Savannah knew it was identified as the consignee as stated on invoices for the demurrage charges, and never contacted Norfolk Southern to notify it of Savannah's status as an agent for any other party.

A consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation charges even in the absence of a separate contractual agreement or relevant statutory provision. See Novolog, at 255 citing Louisville & Nashville Ry. Co. v. Central Iron & Coal Co., 265 U.S. 59, 70 (1924) ("if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the

freight charges, whether they are demanded at the time of delivery, or not until later"); Erie R. Co. v. Waite, 62 Misc. 372, 114 N.Y.S. 1115 (1909) (demurrage may be imposed upon consignees independently of statute or express contract); Gagè v. Morse, 94 Mass. 410, 12 Allen 410, 90 Am. Dec. 155 (Mass. 1866) ("[i]f the consignee will take the goods, he adopts the contract"). Here, there is no evidence that Savannah, as the consignee on the bill of lading, ever rejected the freight shipments at issue. In fact, the only evidence is that Savannah accepted the rail cars and freight upon delivery by Norfolk Southern; what it did with the freight after delivery is neither known nor relevant to Norfolk Southern. See Savannah's Statement of Material Facts, ¶ 6. Therefore, as the consignee who accepted the rail cars and freight, Savannah became part of the transportation contract and is liable for the demurrage charges sought by Norfolk Southern.

C. Savannah's "lack of a relationship" with freight does not preclude Norfolk Southern's recovery of demurrage charges

Savannah argues that it is not the consignee for the freight it handles due to its "lack of a relationship" with the freight. See Brief, p. 8. As discussed extensively in the seminal demurrage case of Novolog, a consignee's lack of a relationship with freight does not preclude a consignee from being liable for demurrage. As described by Savannah in its Statement of Facts (Brief, pp. 1-3), the factual similarities between the facts of this case and the Novolog case are almost identical.

The U.S. Court of Appeals for the Third Circuit in Novolog addressed whether a transloader could be subject to demurrage. In Novolog, CSX delivered to Novolog rail cars loaded with steel, which Novolog unloaded and transferred onto other modes of transportation. See Novolog, p. 250. Novolog did not have any ownership interest in any of the shipments at issue, but rather received and forwarded cargo on behalf of others and on their instructions. See

Novolog, pp.250-251. In almost identical circumstances as Novolog, Savannah states in its Statement of Facts and in the Affidavit of Billy Groves (Exhibit "A" to Savannah's Motion) that after receiving freight via rail, "Brampton Enterprises workers unload the freight and forward it to various ports for export according to instructions from the freight forwarding company." See Brief, pp. 1-2. Therefore, despite Savannah's contention that it cannot be a consignee based upon its relationship with the freight, the Third Circuit in Novolog has stated that Savannah's "relationship" with freight is not determinative, only its role in accepting delivery of rail cars and freight as a consignee is determinative of its liability to Norfolk Southern.

D. Savannah's failure to reject the freight and notify Norfolk Southern of its agent status makes Savannah liable for demurrage

The case law cited by Savannah does not support its position that being identified as the consignee on the bill of lading is insufficient to make it liable for demurrage. Savannah's reliance on Illinois Cent. R. Co. v. South Tec Development Warehouse, Inc., 337 F.3d 813 (7th Cir. 2003) is misplaced. In South-Tec, the trial court found the defendant liable for demurrage without making a finding as to whether it was, in fact, the consignee of the shipments at issue. On appeal, the U.S. Court of Appeals for the Seventh Circuit determined that the defendant would be liable for demurrage charges if it were either "a consignee *or* if it contractually assumed responsibility for demurrage charges." South-Tec, 337 F.3d at 820 (citations omitted)(emphasis added). The Court of Appeals reversed the trial court and remanded the case with instructions to the trial court to determine who was the consignee.

Here, Savannah was clearly designated as the consignee on the bills of lading and/or electronic bill of lading data, attached to Exhibit "A" and conducted itself as the consignee in accepting delivery for all the shipments in question. Savannah's named status on the bills of

lading and/or electronic bill of lading data, attached to Exhibit "A," and conduct as the consignee is sufficient to establish its liability for demurrage charges in this case.

The decision in Union Pacific Railroad Co. v. Carry Transit, Inc., 2005 U.S. Dist. LEXIS 45568 (N.D. Tex. Oct. 27, 2005) is also not helpful to Savannah. As stated in Novolog, a named consignee can avoid liability when unilaterally designated as a consignee by a carrier or shipper by (1) refusing the freight and (2) by providing the carrier timely written notice of agency. See Novolog, at 259. Here, Savannah has proffered no evidence that it either refused the freight or ever notified Norfolk Southern that it was a "care of" agent for the freight. Accordingly, pursuant to the Novolog decision, Savannah can be held liable for the demurrage charges in question.

Furthermore, the case of CSX Transp., Inc. v. City of Pensacola, Fla., 936 F. Supp. 880 (N.D. Fla. 1995) has no applicability whatsoever to this case, as the defendant in that case was not identified as a consignee on a single bill of lading. Id. at 883. The facts presented were:

The Port was not a party to the contract of transportation on any of the shipments which were delayed. CSX also admits that the Port was never listed on the bills of lading as owner, consignor, or consignee of the shipment. In a few cases, the bill of lading indicated the goods where (sic) to be shipped to the legal consignee "in care of" the Port.

Id. It is also instructive to review the succinct summary of the City of Pensacola case by the U.S. Court of Appeals in the South Tec decision, which stated, "[t]he City of Pensacola Court relied on the fact that none of the bills of lading on shipments to the Port listed the Port as consignee." South Tec, at 821, citing City of Pensacola, at 884. Therefore, because Savannah is listed as a consignee on the applicable bills of lading, the City of Pensacola decision has no bearing on this case.

The case of Ingersoll Mill. Mach. Co. v. M/V Bodena, 829 F.2d 293 (2nd Cir. 1987), is also inapplicable for the proposition asserted because there is absolutely no evidence that Norfolk Southern altered a bill of lading. Thus, this case does not support Savannah's position that it is not liable for demurrage.

The case of Western Maryland Ry. Co. v. South African Marine Corp., 1987 U.S. Dist. LEXIS 7323 (S.D.N.Y. Aug. 13, 1987) is also not persuasive. In this case, the Court held that "where ... a connecting carrier-consignee is merely named in the railroad bill of lading without either more involvement on its part, or some culpability for the delay, it cannot be held liable to the railroad for demurrage. See Western Maryland, at * 9. Here, Savannah accepted the freight (involvement on its part) and its delay in unloading the railcars resulted in demurrage accruing (culpability for delay). Thus, the facts of this case are much different than in Western Maryland. Furthermore, the court in Western Maryland goes on to state, "a consignee's acceptance of cargo may lead to an obligation to pay demurrage costs." See Western Maryland, at *10 quoting States Marine Int'l v. Seattle-First Nat'l Bank, 524 F.2d 245, 248 (9th Cir. 1975). There is no questioning that Savannah accepted the freight at issue.

The Southern Pacific Transp. Co. v. Matson Navigation Co., 383 F. Supp. 154 (D. Cal. 1974) also does not help Savannah establish its defenses. The Matson decision is very similar to the South Tec matter and is similarly distinguishable from the facts presented here. Again, the defendant in Matson appears "neither as shipper nor consignee in a bill of lading," and the court based its ultimate ruling on this fact. Matson, at 157. The Matson court noted:

In all instances, the inland shipper appeared as consignor on both bills of lading, and in most cases the Hawaii purchaser appeared as consignee. On these bills of lading Matson was named as the "care of" party. However, in a few cases the shipment was consigned to defendant on the railroad bill of lading.

Id. at 155 (Emphasis added). Accordingly, the Matson case does not establish that Savannah is not liable for the demurrage charges in question.

Savannah is also incorrect when it asserts that the Novolog decision stands for the proposition that “nothing more than unilateral inclusion in a bill of lading can turn an entity into a consignee and therefore subject to demurrage.” See Brief, pp. 9-10. As clearly delineated by the Third Circuit in Novolog, a consignee can avoid liability in two ways:

- (1) by refusing the freight (which Savannah never did); and
- (2) by providing the carrier timely written notice of agency (which Savannah never did) under Section 10743(a)(1), if appropriate.

See Novolog, at 259. “Recipients of freight who should not be saddled with liability for transportation charges arising after delivery can escape it with little effort by simply providing written notice of their status to the carrier.” Id. Here, Savannah never undertook the simple steps to avoid liability for the demurrage.

Additionally, Savannah’s contention that the Third Circuit’s holding in Novolog is contrary to basic contract law is also ill-informed. In an oft-repeated principal of law cited in Novolog, which quotes the United State Supreme Court, provides “the consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation charges ...” See Novolog, at 254-255. Furthermore, as delineated by the Third Circuit, 49 U.S.C. § 10743 (a)(1) specifically addresses the situation present in the case before this court where a consignee contests its liability for freight charges on the grounds that it is the middleman. Section 10743 (a)(1) clearly states what a consignee must do to avoid liability, which is to simply notify the carrier in writing of the agency status. Savannah never notified Norfolk Southern that it was not the consignee. In fact, in

correspondence sent to Norfolk Southern, Savannah did not contest its status as a consignee, but only contested the amount of the demurrage charges. See Exhibit "A," 5. Not until the lawsuit was filed with the court did Savannah suddenly allege that it was not the consignee for the freight, notwithstanding that Savannah accepted the freight and never informed Norfolk Southern that it was a "care of" party for the freight.

Savannah's interpretation of Novolog is also incorrect when discussing what it perceives to be the Third Circuit's "self-fulfilling definition" of what a consignee is. As clearly delineated and substantiated by the Third Circuit in Novolog, to require further evidence of consent or involvement supporting the correctness of the designation in the relevant bills of lading [as consignee] would frustrate the plain intent of Section 10743, which is to facilitate the effective assessment of charges by establishing clear rules for liability. See Novolog, at 258. As succinctly stated in Novolog:

For demurrage charges to fulfill their purpose of ensuring the smooth functioning of the rail freight system by creating disincentives against delays, railways must be able to assess them effectively and without being mired in disputes. Section 10743 is designed to ensure just that. The simple rule that the named consignee becomes liable for demurrage charges upon acceptance of the freight unless it timely notifies the carrier of an agency relationship allows railroads to rely on the bills of lading and avoid wasteful attempts to recover from the wrong parties. For their part, recipients of freight who should not be saddled with liability for transportation charges arising after delivery can escape it with little effort by simply providing written notice of their status to the carrier.

See Novolog, at 259. Here, Savannah, after accepting the freight, never informed Norfolk Southern that it was not the consignee; instead, Savannah contested the amount of the charges, Savannah did not contest its designation as consignee. Also, it is disingenuous for Savannah to allege that it cannot comply with Section 10743(a)(1) because it does not receive the bill of lading prior to delivery. First, Savannah admits in its Statement of Material Fact (§ 9) that it received shipping instructions for the freight in question, which it then forwarded. Thus, there is

no question that Savannah, an experienced handler of freight, received information pertaining to the freight that designated it as the consignee. Furthermore, Norfolk Southern sent invoices to Savannah for the demurrage charges, which clearly identifies Savannah as the consignee. See Exhibit "A," ¶ 9. In response, Savannah simply contested the amount of the charges, never contesting its status as a consignee. See Exhibit "A," ¶ 5.

Also, even though Savannah is only required to notify Norfolk Southern of its agency status, it is impossible for Savannah to not know the identity of the owner of the freight because according to Savannah, it was forwarding the freight according to instructions provided by the freight forwarding entity. See Savannah's Statement of Material Facts, ¶ 9. Clearly, Savannah had the means to comply with the notice requirements of 49 U.S.C. § 10743 (a)(1), it simply chose not to follow the requirements.

E. There are no genuine issues of material fact concerning Savannah's liability for the demurrage charges at issue

As discussed at length above, there is no genuine issue of material fact which would preclude a determination of Savannah's liability for demurrage. Savannah cannot dispute that it was the sole named consignee on the applicable bills of lading which governed the movement of the rail cars at issue. Savannah cannot dispute that it received the freight which is the subject of the demurrage charges. Finally, and assuming *arguendo* that Savannah was itself an agent for another party, there is no evidence of record that Savannah ever complied with the notice of agency provisions of 49 U.S.C. § 10743(a)(1). Savannah's summary judgment must be denied, and judgment must be entered in favor of Norfolk Southern on its cross-motion for partial summary judgment.

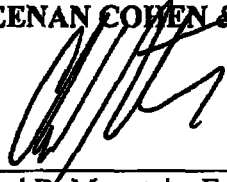
IV. Conclusion

For the foregoing reasons, plaintiff Norfolk Southern Railway Company respectfully requests that this Court deny Savannah's Motion for Summary Judgment and that it grant Norfolk Southern's cross-motion for partial summary judgment finding Savannah liable for the demurrage charges, the amount of damages to be determined at trial.

Respectfully submitted,

KEENAN COHEN & HOWARD P.C.

By:


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Norfolk Southern Railway Company

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Benjamin M. Perkins, Esquire
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P.O. Box 10186
Savannah, GA 31412

Dated: March 13, 2008

CERTIFICATE OF SERVICE

This is to certify that on March 13, 2008, a true and correct copy of the foregoing Brief of Plaintiff Norfolk Southern Railway Company in Opposition to Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Partial Summary Judgment was filed electronically. Notice of this filing will be sent to the following party by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Jason C. Pedigo, Esquire
Ellis, Painter, Ratterree & Adams, LLP
P.O. Box 9946
Savannah, GA 31412

By:


Chad D. Mountain (*pro hac vice*)

A-8

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION**

NORFOLK SOUTHERN RAILWAY CO.

Plaintiff,

v.

BRAMPTON ENTERPRISES, LLC, D/B/A
SAVANNAH RE-LOAD

Defendant.

CIVIL ACTION

NO. 4:07-cv-0155

AMENDED COMPLAINT

Jurisdiction

1. Jurisdiction in this matter is based upon 28 U.S.C. § 1337 inasmuch as this is a cause of action arising under the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.*

Venue

2. Venue properly lies in this judicial district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the cause of action set forth in this Complaint occurred within this judicial district, and the defendant resides within this judicial district.

Parties

3. Plaintiff Norfolk Southern Railway Company ("Norfolk Southern") is a Virginia corporation, having its principal place of business in Norfolk, Virginia. Norfolk Southern operates as an interstate rail carrier subject to the jurisdiction of the United States Surface Transportation Board, and is governed by the provisions of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

4. Upon information and belief, defendant Brampton Enterprises, LLC, d/b/a Savannah Re-load ("Savannah") is a limited liability company formed pursuant to the laws of the State of Georgia and maintains its registered address and/or principal place of business at 139 Brampton Road, Garden City, Georgia 31408.

CAUSE OF ACTION

5. The subject matter of this action stems from rail car demurrage charges assessed pursuant to the provisions of 49 U.S.C. § 10746 relating to freight car use and distribution.

6. Beginning on or about March, 2007 and continuing through August, 2007, Savannah incurred \$70,680.00 in railcar demurrage charges, all of said charges due and owing to Norfolk Southern.

7. Norfolk Southern submitted invoices to Savannah for the demurrage charges that Savannah has incurred from on or about March, 2007 through August, 2007.

8. The assessed demurrage charges were determined and made applicable pursuant to tariffs, rules and rates promulgated and published in accordance with 49 U.S.C. § 10746.

9. Although demand has been made for payment of the aforementioned charges, Savannah has failed and/or refused to pay.

WHEREFORE, plaintiff Norfolk Southern Railway Company respectfully demands that judgment be entered in its favor and against defendant Brampton Enterprises, LLC, d/b/a Savannah Re-load in the amount of \$70,680.00 for demurrage charges together with costs, prejudgment interest, and such other relief as the Court may allow.

KEENAN COHEN & HOWARD P.C.

By: 

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Attorneys for Plaintiff
Norfolk Southern Railway Company

Dated: March 31, 2008

CERTIFICATE OF SERVICE

This is to certify that on March 31, 2008, a true and correct copy of the foregoing Amended Complaint was filed electronically. Notice of this filing will be sent to the following party by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Jason C. Pedigo, Esquire
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Savannah, GA 31412

By: _____


Chad D. Mountain (*pro hac vice*)

A-9

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September 19, 2008

VIA FACSIMILE NO. 215-609-1117

Paul D. Keenan, Esq.
Keenan Cohen & Howard P.C.
One Pitcairn Place
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165 Township Line Road
Jenkintown, Pennsylvania 19046

RE: Norfolk Southern/Brampton Enterprises

Dear Paul:

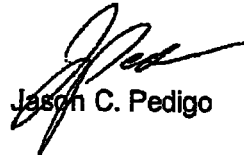
Thank you for your email dated September 16, 2008.

At this point, the Court has ruled that Brampton Enterprises is not liable for any demurrage that may have accrued. In light of that Order, there is no basis for Norfolk Southern to continue to require a deposit pursuant to NS 8002A, Item 6160. Therefore, I request that you confirm that Norfolk Southern has lifted its demurrage deposit requirement and is ready to resume rail car deliveries to Brampton Enterprises. If Norfolk Southern continues to impose a demurrage deposit or any other restriction, please provide me with the legal justification for this position.

If you have any questions, please feel free to give me a call.

I remain,

Very truly yours,


Jason C. Pedigo

JCP/kdr

cc: Benjamin Perkins, Esq. (via facsimile)
Mr. Billy Groves (via regular mail)

A-10

PAUL D. KEENAN
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September 23, 2008

VIA E-MAIL AND U.S. MAIL

Jason C. Pedigo, Esquire
Ellis, Painter, Ratterree & Adams, LLP
2 East Bryan Street, 10th Floor
P.O. Box 9946
Savannah, GA 31412

Re: **Norfolk Southern Railway Co. v. Brampton Enterprises**
U.S. Court of Appeals for the 11th Circuit
Our File No. 4613-159

Dear Jason:

Thank you for your letter of September 19, 2008.

Your client's request to have Norfolk Southern lift its demurrage deposit requirement based upon the summary judgment ruling of the District Court is declined. As you know, the ruling of the District Court is presently unenforceable as the case is under review and now pending before the U.S. Court of Appeals for the 11th Circuit. Please let me know if you have any questions.

Very truly yours,

KEENAN COHEN & HOWARD P.C.

By:


Paul D. Keenan

PDK/nms

A-11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY
COMPANY

v.

BRAMPTON ENTERPRISES, LLC
d/b/a SAVANNAH RE-LOAD

CIVIL ACTION NO. CV407 155

DEFENDANT'S MOTION TO ENFORCE JUDGMENT

Defendant Brampton Enterprises, LLC d/b/a Savannah Re-Load (hereinafter "Savannah Re-Load") moves this Court for an Order enforcing its judgment and enjoining Norfolk Southern Railway Company (hereinafter "NS") from imposing a security deposit for payment of demurrage charges (hereinafter "demurrage deposit").

Pursuant to its tariff, Norfolk Southern may impose a demurrage deposit if, and only if, a customer fails to pay accrued demurrage. This Court ruled on September 15, 2008 that Savannah Re-Load did not owe demurrage and NS has not sought a stay of this judgment while the case is on appeal to the United States Court of Appeals for the Eleventh Circuit. Consequently, this Court's order is in effect and enforceable.

Nevertheless, NS has refused to abide by the Court's order and has instead imposed a demurrage deposit upon Savannah Re-Load. Permitting NS to disregard this Court's order and impose this demurrage deposit upon Savannah Re-Load will result in irreparable harm with no adequate remedy at law, as more fully shown by the attached affidavit of William Groves and the following memorandum of law.

Memorandum of Law

Statement of Facts

As stated in previous briefs, Savannah Re-Load is a warehouseman whose business consists, in part, of unloading freight delivered to its facility and "reloading" it for export through the Georgia Ports Authority. (Affidavit of William Groves, attached as Exhibit "A" to this Motion, p. 1). Approximately 30%-35% of Savannah Re-Load's revenue comes from unloading and reloading rail freight. (*Id.*).

NS is the only rail carrier which services Savannah Re-Load's facility. (*Id.*). All rail freight sent to Savannah Re-Load's facility is therefore delivered by NS. (*Id.*). As a result, when NS refuses to deliver freight to Savannah Re-Load's facility, Savannah Re-Load has no alternative means to have rail freight delivered to its facility. (*Id.*).

NS has a tariff provision, NS 8002-A, which permits it to impose a deposit requirement upon customers who owe it demurrage.¹ (NS 8002-A, a copy of this tariff is attached as Exhibit "B").² Pursuant to this tariff provision, NS will inform a customer that a rail car has arrived for delivery but will not deliver the car unless the demurrage deposit is first paid. (Groves Aff., pp. 1-2). This demurrage deposit is non-transferrable (Exhibit "B", § B), so that Savannah Re-Load must pay a new deposit for each car that arrives. Savannah Re-Load has paid the deposit several times and each time it has taken NS between 36 and 81 days to return the deposit after the rail car was returned to NS. (Groves Aff., p. 2).

¹ This tariff provision also provides security for storage and other accessorial charges. However, NS has never invoiced or demanded a storage or accessorial charge from Savannah Re-Load. (Groves Aff., p. 4).

² This tariff is attached to Exhibit A-1 of Billy Groves' affidavit; it is set forth as a separate exhibit for the Court's convenience.

Savannah Re-Load can handle five rail cars at any one time. (Groves Aff., p. 2). The demurrage deposit imposed by NS is \$1,200 per rail car. (*Id.*). Pursuant to this demurrage deposit, if Savannah Re-Load were operating at full capacity, it would be required to pay \$6,000 per day for 36-81 days before it began receiving a refund of its deposit. (*Id.*). Under this scenario, Savannah Re-Load would have between \$216,000 and \$486,000 deposited with Norfolk Southern at any one time in order to receive rail service. During the time period NS claims that Savannah Re-Load incurred demurrage, Savannah Re-Load typically unloaded five rail cars per day. (*Id.*).

NS first imposed this demurrage deposit prior to initiating this lawsuit. (Groves Aff., p. 2). That demurrage deposit remained in place until the parties entered into a Conditional Settlement Agreement and Release (hereinafter referred to as "Settlement Agreement")(Exhibit A-2)³. Savannah Re-Load did not have \$216,000 to 486,000 to "deposit" with NS and was therefore forced to cease warehousing rail freight. (Groves Aff., pp. 2-3). This inability to receive rail freight caused Savannah Re-Load's revenues to drop sharply and ruptured its business relationship with Galaxy Forwarding, the freight forwarding company which sent all rail freight to Savannah Re-Load's facility at the time the demurrage deposit was imposed. (*Id.*, p. 3). Savannah Re-Load has not been able to restore its business relationship with Galaxy Forwarding. (*Id.*).

On September 15, 2008, this Court granted Savannah Re-Load summary judgment on NS's claim for demurrage. (Doc. 68). Four days later, on September 19, 2008, counsel for Savannah Re-Load wrote counsel for NS and requested that NS confirm it had lifted the demurrage deposit in light of this Court's order holding that

³ For Exhibits A-1 and A-2, please see the affidavit of Billy Groves, attached as Exhibit "A."

Savannah Re-Load did not owe demurrage. (Exhibit C-1)⁴ Counsel for NS responded and stated that the demurrage deposit would remain in place because this Court's order "is presently unenforceable as the case is under review and now pending before the U.S. Court of Appeals for the 11th Circuit." (Exhibit C-2). In light of the upcoming mediation required by the United State Court of Appeals for the Eleventh Circuit, Savannah Re-Load elected to refrain from filing any motion related to this matter in an effort to foster an atmosphere conducive to settlement. (Groves Aff., p. 3).

At mediation, the parties were able to reach a conditional compromise and executed the above-referenced Settlement Agreement (Exhibit A-2). Pursuant to this settlement agreement, Savannah Re-Load delivered a \$55,000 cashier's check to NS and, in exchange, NS waived the demurrage deposit. (*Id.*). However, because the Settlement Agreement was conditional,⁵ the parties agreed to restore the status quo as it existed at the time of the Settlement Agreement if the agreement's condition precedent was not satisfied. Because the check was a cashier's check, the bank debited \$55,000 from the bank account upon which it was drawn before issuing the check. (Groves Aff., p. 3).

More than a month later, NS revealed it had misplaced the cashier's check. (Exhibit C-3). It requested Savannah Re-Load reissue a replacement check. (*Id.*). However, because the check was a cashier's check, the funds of which were guaranteed to be available by the bank, the issuing bank refused to "stop payment," re-issue it, or refund the money unless William Groves agreed to personally indemnify the bank in the event the check was negotiated. (Groves Aff., pp. 3-4). Before the parties

⁴ For Exhibits C-1 through C-8, please see the affidavit of Jason Pedigo, attached as Exhibit "C."

⁵ The Settlement Agreement was conditioned on this Court agreeing to vacate its order granting Savannah Re-Load summary judgment.

could resolve this issue, this Court denied the parties' joint motion for certification, (Doc. 80), rendering the Settlement Agreement null and void.

NS then refused to refund Savannah Re-Load's payment of \$55,000. (Groves Aff., p. 4). Despite not seeking a stay from the Court's grant of summary judgment, pursuant to FED. R. CIV. P. 62, NS unilaterally reinstated the demurrage deposit under the same conditions as before. (Exhibit A-1). The following day, counsel for NS confirmed this action. (Exhibit C-4).⁶ Savannah Re-Load has not been invoiced for any demurrage that might have accrued since this lawsuit began. (Groves Aff., p. 4). Therefore, the demurrage deposit is not imposed because of "new" demurrage but instead is premised upon the same pre-suit demurrage this Court has ruled it does not owe.

Counsel for Savannah Re-Load wrote to NS to reiterate that NS has not refunded the settlement payment. (Exhibit C-5). Counsel requested in the letter that NS lift the demurrage deposit on the grounds that NS had failed to refund the \$55,000 and had not requested or obtained a stay of this Court's summary judgment ruling. (*Id.*).

Without bothering to discuss its terms with Savannah Re-Load, NS unilaterally provided an "Indemnification Agreement" which purported to indemnify Savannah Re-Load (instead of William Groves)⁷ only in the event NS—and not anyone else who obtained custody of the check from NS or its employees or agents—negotiated the

⁶ Though this letter was dated March 4, 2009, it was faxed to counsel for Savannah Re-Load on March 5, 2009.

⁷ As the issuing bank requires William Groves to personally indemnify it in order to refund the money, an indemnity in favor of Brampton Enterprises does not provide any protection to Mr. Groves.

check.⁸ (Exhibit C-6). NS declined to provide a legal basis for imposing the demurrage deposit. (*Id.*). It also refused to entertain changes to the indemnification it had provided to Savannah Re-Load. (Exhibit C-7).

Given the present state of the economy, the volume of freight being exported through the Georgia Ports Authority has dramatically declined. (Groves Aff., p. 4). Nevertheless, one company, Roxcel Corporation, has stated it will begin using Savannah Re-Load's services to "reload" freight for export. (*Id.*). Roxcel Corporation has informed Savannah Re-Load that shipments of freight destined for Savannah Re-Load's facility will begin on or about Monday, March 15, 2009. (*Id.*). Mr. Groves expects this freight to arrive approximately seven to fourteen days later. (*Id.*). When it arrives, Savannah Re-Load will be subject to NS's demurrage deposit requirement despite the fact that this court has ruled Savannah Re-Load owes no demurrage. This demurrage deposit will therefore harm Savannah Re-Load's business relationship with Roxcel Corporation, likely causing it to discontinue using Savannah Re-Load's services. (*Id.*).

Savannah Re-Load cannot afford to pay \$1,200 per rail car, per day when it may not receive a refund for 36-81 days, especially as NS has kept the \$55,000 settlement payment. (Groves Aff., pp. 4-5). The demurrage deposit will severely harm, if not destroy, Savannah Re-Load's nascent business relationship with Roxcel Corporation. (*Id.*, p. 5). Additionally, NS's demurrage deposit embargoes Savannah Re-Load, preventing it from carrying on a primary business operation; without rail service Savannah Re-Load will be unable to generate sufficient revenue to survive. (*Id.*). If the

⁸ For example, the indemnity agreement was limited so that it did not apply in the event a NS employee stole the check and negotiated it. Nor would it apply in the event a third party found and negotiated it.

deposit is not lifted, Savannah Re-Load will be unable to continue as a viable entity and will be forced to go out of business. (*Id.*). The potential harm of a demurrage deposit is not limited to Savannah Re-Load. Several members of Brampton Enterprises, LLC have personally guaranteed company debt; in the event Savannah Re-Load goes out of business and is unable to service its debt, they may be called upon personally to satisfy these obligations. (*Id.*).

Savannah Re-Load has made several attempts to negotiate a mutually acceptable compromise on this issue in order to avoid involving this Court. However, NS has refused to discuss any compromise and instead presented Savannah Re-Load with a non-negotiable demand that, unless accepted, will leave the demurrage deposit in place. (Exhibit C-7).

Argument and Citation of Authority

A. This Court has jurisdiction to enforce its orders

Notice of appeal typically divests the district court of jurisdiction. *Alberti v. Klevenhagen*, 46 F.3d 1347, 1358 (5th Cir. 1995). However, "a district court maintains jurisdiction as to matters not involved in the appeal...." *Id.* (emphasis added). As both the Eleventh Circuit has recognized, this Court retains jurisdiction over issues which are collateral to the merits of an appeal, and as such may consider motions filed even after the court no longer has jurisdiction over the substance of the case. *Mahone v. Ray*, 326 F.3d 1176, 1180 -1181 (11th Cir. 2003).

Pursuant to this rule, a district court has continuing jurisdiction over its judgment and, during appeal, may take necessary steps to enforce its orders. *Plaquemines Parish Commission Council v. United States*, 416 F.2d 952 (5th Cir. 1969). "[The

appeal] has no impact on the trial court's powers to enforce its unstayed judgment since [it] has retained that power throughout the pendency of the appeal." *Deering Milliken, Inc. v. F.T.C.*, 647 F.2d 1124, 1128-1129 (D.C. Cir. 1978)(internal footnotes omitted).

In *Plaquemines Parish Commission Council*, the district court entered a comprehensive desegregation decree on June 27, 1967, which the School Board promptly appealed. While the matter was on appeal, the appellants attempted to circumvent the district court's decree by withholding funding from the school system and forcing it to close. *Id.* at 953. The district court therefore enjoined the appellants from doing so and the former Fifth Circuit affirmed, holding that the appeal did not prevent the district court from issuing additional rulings necessary to maintain the status quo and to insure the enforcement of its previous orders. *Id.* at 954. Though the case was on appeal, the district court retained jurisdiction to enforce its previous orders. *Id.*

Like the district court in *Plaquemines Parish Commission Council*, this Court has the power to grant injunctive relief in order to prevent NS from ignoring its previous, unstayed order which held that Savannah Re-Load is not liable for demurrage. This Court "has the inherent power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments." *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996)(emphasis added).

B. This Court should enjoin NS from disregarding its summary judgment ruling.

Savannah Re-Load requests an Order enforcing this Court's grant of Savannah Re-Load's motion for summary judgment and enjoining NS from disregarding that order and imposing a demurrage deposit. NS has not sought or obtained a stay of this

Court's order, either in the district court or in the circuit court, and Savannah Re-Load has not been invoiced for any demurrage that accrued since this lawsuit was filed (Groves Aff., p. 4). Therefore, the sole basis for this deposit is NS's decision completely to ignore this Court's order.

NS has not sought a stay of this Court's judgment pursuant to FED. R. CIV. P. 62 or FED. R. APP. P. 8(a)(1)(A). Thus, this Court's judgment is not superseded and is in effect.

"A party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of a district court pending appeal. . . ." FED. R. APP. P. 8(a)(1)(A). "The general rule is that the judgment of a district court becomes effective and enforceable as soon as it is entered; there is no suspended effect pending appeal unless a stay is entered." *In re Copper Antitrust Litigation*, 436 F.3d 782, 793 (7th Cir. 2006); *see also, LiButti v. United States*, 178 F.3d 114, 121 (2nd Cir. 1999)("It has been long-established law that simply filing an appeal from the grant or denial of an injunction-absent a stay of further proceedings-does not enjoin the operative effect of the trial court's ruling from which the appeal is taken.").

NS chose not to comply with these rules yet disregards this Court's ruling and claims it is "not presently enforceable" (Exhibit C-2), a position directly contrary to "long established law," *In re Copper Antitrust Litigation, supra*, and one which renders FED. R. CIV. P. 62 and FED. R. APP. P. 8 moot and superfluous. "The fact that these rules have been in effect for a significant period of time without untoward developments is an indication of the meaningfulness of these rules." *American Grape Growers Alliance for*

Fair Trade v. U.S., 9 C.I.T. 568, 570, 622 F. Supp. 295, 297 (Ct. Int'l. Trade 1985).⁹

"[T]he enforceability of this Court's judgments should be unquestioned, and a stay is the only way to put off that enforceability." *Id.*, at 570, 622 F. Supp. at 297.

Ignoring this Court's order, NS has imposed a demurrage deposit requirement which directly contradicts the judgment of this Court that Savannah Re-Load is not liable for demurrage and which will result in grave and immediate harm to Savannah Re-Load and the members of Brampton Enterprises, LLC. Savannah Re-Load therefore moves this Court to enforce its order and enjoin NS from imposing the deposit during the pendency of its appeal. Such an order is apparently the only way NS will obey this Court's former ruling and refrain from inflicting harm upon Savannah Re-Load.

C. Even were the Court to analyze NS's actions under the traditional test for injunctions, an injunction preventing NS from imposing a demurrage deposit is warranted

In deciding whether to enforce its order during the appeal, this Court is not required to employ the traditional test for granting preliminary or permanent injunctions. *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996). Where the issue is obedience to the Court's order, such "an inquiry falls squarely within the court's inherent power to determine the effect of its prior judgments. Where a party's conduct is in violation, or evasive, of a prior judgment, the [Court] also has authority to enjoin that conduct regardless of whether the conduct amounts to civil contempt." *Id.*, at 1054. However, should the Court find it useful to analyze this Motion within the framework of a traditional prayer for injunctive relief, it will find that enforcement is still warranted.

⁹ "The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C.A. § 1585.

To obtain a traditional injunction, the movant must show (1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest. *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983). Each of these criteria is satisfied here and an injunction is therefore warranted. As NS intends to keep the demurrage deposit in place indefinitely, Savannah Re-Load requests that this Court order it to lift the deposit while the case is on appeal.

I. Neither the law nor the Settlement agreement permit NS to impose a deposit upon Savannah Re-Load as NS has not sought a stay of the summary judgment order and not refunded Savannah Re-Load's \$55,000.

For the reasons stated in Subsection "B" above, Norfolk Southern cannot impose a demurrage deposit in light of this court's unstayed order granting Savannah Re-Load summary judgment on the issue of liability for demurrage.

NS has stated that has re-imposed the demurrage deposit because, with the Settlement Agreement now null and void, "the status quo must be restored." (Exhibit C-4). However, the "status quo" that existed at the time the parties executed the Settlement Agreement was that an unstayed judgment was in effect, pursuant to which Savannah Re-Load was not liable for demurrage. Therefore, returning to the "status quo" does not give NS a basis to impose this demurrage deposit.

Moreover, NS has not refunded Savannah Re-Load's \$55,000 as required by the Settlement Agreement. (Groves Aff., p. 4). It therefore has not complied with the Settlement Agreement and not restored the status quo.

ii. Savannah Re-Load will suffer irreparable harm if this injunction does not issue.

The demurrage deposit, if left in place, will irreparably harm Savannah Re-Load's business relationship with Roxcel Corporation. (Groves Aff., p. 4). The last time NS imposed a demurrage deposit, it ruptured Savannah Re-Load's relationship with Galaxy Forwarding, a relationship Savannah Re-Load was unable to restore. (*Id.*, p. 3). Since the deposit will similarly prevent Savannah Re-load from servicing Roxcel Corporation's needs, Savannah Re-Load will experience the same harm to its business relationship. (*Id.*).

More importantly, NS's demurrage deposit chokes off all rail service to Savannah Re-Load. As a significant portion of Savannah Re-Load's revenue is generated by unloading and reloading freight which arrives via rail, NS's demurrage deposit prevents Savannah Re-Load from doing business. (Groves Aff., p. 5). Therefore, the demurrage deposit will be economically devastating to Savannah Re-Load and almost certainly cause it to go out of business. (*Id.*). Without the ability to generate revenue, Savannah Re-Load cannot remain economically viable. (*Id.*).

NS's deposit requirement will spread harm beyond Savannah Re-Load to members of Brampton Enterprises, LLC. Certain members of Brampton Enterprises have personally guaranteed Savannah Re-Load's debt. (Groves Aff., p. 5). If NS prevents Savannah Re-Load from doing business, Savannah Re-Load will likely default

on its repayment obligations. (*Id.*). If this occurs, those guarantor-members of Brampton Enterprises, LLC will become personally liable for this debt and suffer great financial harm. (*Id.*).

Savannah Re-Load does not have an adequate remedy at law. The impending harm to its relationship with Roxcel Corporation alone satisfies this prong. *GSW, Inc. v. Long County, Ga.*, 999 F.2d 1508, 1519 (11th Cir. 1993); *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992)(“The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute.”).

However, the demurrage deposit is also a real and immediate threat to Savannah Re-Load's very ability to survive. Thus, Savannah Re-Load's damages are not compensable by a money damages award. “A damages remedy is inadequate if it would come too late to save [the movant's] business. . . .” *Massachusetts Mut. Life Ins. Co. v. Associated Dry Goods Corp.*, 786 F. Supp. 1403, 1415 (N.D. Ind.1992); *Rabbi Jacob Joseph School v. Province of Mendoza*, 342 F. Supp. 2d 124, 126 (E.D.N.Y. 2004)(“injunctive relief may be granted where . . . the movant shows that the loss would force him into bankruptcy. . . .”).

Finally, NS's election to disregard this Court's ruling is sufficient reason to enjoin it from imposing a demurrage deposit. “Although the need to prevent irreparable injury to a party is an important factor. . . the most compelling reason to grant this request is the need to prevent the judicial process from being rendered futile by [the non-movant's] action or refusal to act.” *Puerto Rico Conservation Foundation v. Larson*, 797 F. Supp. 1066, 1070 (D. Puerto Rico 1992)(internal quotations omitted). “It is beyond question

that obedience to judicial orders is an important public policy." *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298 (1983). "This sanctity expresses itself in many forms, most strikingly in the collateral order doctrine, which requires a party subject to a court order to comply with it, pending further review, even if the order arguably violates important constitutional rights." *Citizens Concerned About Our Children v. School Bd. of Broward County, Fla.*, 193 F.3d 1285, 1292 (11th Cir. 1999).

III. The hardship suffered by Savannah Re-Load far outweighs any hardship to Norfolk Southern.

NS will suffer no harm should it deliver freight to Savannah Re-Load's facility without imposing a demurrage deposit. NS imposes this demurrage deposit to ensure that demurrage is paid. However, NS can collect demurrage from other sources. NS can seek demurrage from the freight's consignor, the actual consignee, or the shipper who contracts with NS to deliver the freight. *Illinois Cent. R. Co. v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 820 (7th Cir. 2003). Given these options, there is no risk that demurrage—if it accrues—will go unpaid. Moreover, NS is now aware that Savannah Re-Load is never the consignee for freight delivered to its facility; it can therefore take the appropriate steps to collect demurrage from the proper party.

Finally, even if NS finds it more difficult to collect demurrage once the deposit is lifted, this inconvenience is a minor hardship relative to the severe, devastating hardship it seeks to inflict upon Savannah Re-Load.

iv. The Injunction will not be adverse to the public interest.

Given the important public policy favoring obedience and adherence to judicial rulings, *W.R. Grace & Co, supra*, the public interest is best served by compelling NS to comply with this Court's rulings and enjoining it from imposing a demurrage deposit upon Savannah Re-Load. Such an injunction would also have the effect of ensuring future compliance with federal rules of civil and appellate procedure governing judgments and stays therefrom.

D. This Court should award attorney's fees.

This Court has the inherent power to award attorney's fees if a party or attorney acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Rothenberg v. Security Management Company*, 736 F.2d 1470, 1471 (11th Cir. 1984). "The inquiry will focus primarily on the conduct and motive of a party, rather than on the validity of the case." *Id.* "The bad faith exception to the American Rule is not limited to suits that are filed in bad faith. The exception also encompasses bad faith acts preceding and during litigation." *Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1543 (11th Cir. 1985). The Court is also empowered to assess attorney's fees for the willful disobedience of a court order. *Id.*

Norfolk Southern has reinstated a demurrage deposit on all rail freight sent to Savannah Re-Load's facility in bad faith and forced Savannah Re-Load to file this motion seeking enforcement of this Court's summary judgment order. It made no effort to seek a stay of this Court's order and similarly made no effort to provide any legal justification to Savannah Re-Load for its actions. (Exhibit C-6). NS's bad faith is also evidenced by its rush to reinstate the demurrage deposit despite refusing to refund

Savannah Re-Load's \$55,000 settlement payment. When Savannah Re-Load attempted to discuss the matter with it, NS refused, instead unilaterally executed an indemnity agreement which provided little protection. Therefore, Savannah Re-Load requests this Court award attorney's fees for having to bring this matter before the Court.

This 16th day of March, 2009.

/s/ Jason C. Pedigo
Jason C. Pedigo
Georgia Bar No. 140989
Ellis, Painter, Ratterree & Adams LLP
Post Office Box 9946
Savannah, Georgia 31412
Telephone: (912) 233-9700
Email: jpeditgo@epra-law.com
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY
COMPANY,

Plaintiff,

v.

BRAMPTON ENTERPRISES, LLC
d/b/a SAVANNAH RE-LOAD,

Defendant.

CIVIL ACTION NO. CV407 155

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within and foregoing document on all parties in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a result of electronic filing.

This 16th day of March, 2009.

/s/ Jason C. Pedigo

Jason C. Pedigo

Georgia Bar No. 140989

Ellis, Painter, Ratterree & Adams LLP

Post Office Box 9946

Savannah, Georgia 31412

Telephone: (912) 233-9700

Email: jpeditgo@epa-law.com

Attorneys for Defendant

EXHIBIT A

STATE OF GEORGIA
COUNTY OF CHATHAM

)
)

AFFIDAVIT

PERSONALLY appeared before the undersigned officer duly authorized to administer oaths, WILLIAM GROVES, who, upon first being duly sworn on oath, deposes and states as follows:

"I am over the age of 18, competent to testify on my own behalf, and the following is based upon my personal knowledge.

I have operated Brampton Enterprises, LLC's (hereinafter "Savannah Re-Load") business operations conducted under the registered trade name of 'Savannah Re-Load' since 2006. Savannah Re-Load is a warehouseman whose business consists, in part, of unloading freight delivered to its facility and "reloading" it for export through the Georgia Ports Authority. I estimate that approximately 30%-35% of Savannah Re-Load's revenue comes from unloading and reloading rail freight.

Norfolk Southern Railway Company (hereinafter "Norfolk Southern") is the only rail carrier which services Savannah Re-Load's facility. All rail freight sent to Savannah Re-Load's facility is therefore delivered by Norfolk Southern. As a result, when Norfolk Southern refuses to deliver freight to Savannah Re-Load's facility, Savannah Re-Load has no alternative means to have rail freight delivered to its facility.

Norfolk Southern has provided me with a tariff provision, Norfolk Southern 8002-A, which permits it to impose a deposit requirement upon customers who owe it demurrage. Based upon my experience with this tariff, Norfolk Southern will inform Savannah Re-Load that a rail car has arrived for delivery but will not deliver the car unless Savannah Re-Load first pays a demurrage deposit in an amount calculated by Norfolk Southern. This

demurrage deposit is non-transferrable between cars, so Savannah Re-Load must pay a new deposit for each car that arrives. Savannah Re-Load has paid the deposit several times and each time it has taken Norfolk Southern between 36 and 81 days to return the deposit after the rail car was returned to Norfolk Southern.

Savannah Re-Load's facility can handle five rail cars at any one time. Norfolk Southern's demurrage deposit for Savannah Re-Load is \$1,200 per rail car. Pursuant to this demurrage deposit, if Savannah Re-Load were operating at full capacity, it would be required to pay \$6,000 per day for 36-81 days before it began receiving a refund of its deposit. Under this scenario, Savannah Re-Load would have between \$216,000 and \$486,000 deposited with Norfolk Southern at any one time in order to receive rail service. During the time period Norfolk Southern claims that Savannah Re-Load incurred demurrage, Savannah Re-Load typically unloaded five rail cars per day.

In 2007, Norfolk Southern began sending monthly demurrage bills to Savannah Re-Load. Norfolk Southern downward revised each of these monthly invoices at least once after Savannah Re-Load continuously pointed out errors in them. After it filed suit, Norfolk Southern further reduced its demurrage demand from \$133,000.00 to \$70,680.00. I learned that this last reduction was based upon the fact that Norfolk Southern was claiming demurrage for freight where Savannah Re-Load was not named as consignee.

Norfolk Southern imposed this demurrage deposit prior to initiating this lawsuit. That demurrage deposit remained in place until the parties entered into a Conditional Settlement Agreement and Release (hereinafter referred to as "Settlement Agreement") Savannah Re-Load did not have \$216,000 to 486,000 to "deposit" with Norfolk Southern and was therefore forced to cease warehousing rail freight. This inability to receive rail

freight caused Savannah Re-Load's revenues to drop sharply and ruptured its business relationship with Galaxy Forwarding, the freight forwarding company which sent all rail freight to Savannah Re-Load's facility at the time the demurrage deposit was imposed. Savannah Re-Load has not been able to restore its business relationship with Galaxy Forwarding.

Following the district court's grant of Savannah Re-Load's motion for summary judgment, Norfolk Southern refused to lift the deposit. However, in light of the upcoming mediation required by the United State Court of Appeals for the Eleventh Circuit, Savannah Re-Load elected to refrain from filing any motion related to this matter in an effort to foster an atmosphere conducive to settlement.

At mediation, the parties were able to reach a conditional compromise and later executed a Conditional Settlement Agreement and Release. A true and correct copy of this document is attached as Exhibit A-2 to my affidavit. Pursuant to this settlement agreement, Savannah Re-Load delivered a \$55,000 cashier's check to Norfolk Southern and, in exchange, Norfolk Southern waived the demurrage deposit. Because the check was a cashier's check, the bank debited \$55,000 from the account from which it was drawn issuing the check.

I later learned that Norfolk Southern had misplaced the cashier's check I delivered to them. I inquired into having the bank issue a replacement check. However, because the check was a cashier's check, the funds of which were guaranteed to be available by the bank, the issuing bank refused to "stop payment," re-issue it, or refund the money unless I agreed to personally indemnify the bank in the event the check was negotiated by anyone.

On March 4, 2009, without any notice to me, Norfolk Southern unilaterally reinstated the demurrage deposit against Savannah Re-Load under the same terms and condition as before this lawsuit was initiated. Exhibit "A-1" to my affidavit is a true and correct copy of the letter I received from Norfolk Southern on March 4, 2009.

Norfolk Southern has refused to refund the \$55,000 settlement payment. Savannah Re-Load has not been invoiced for any "new" demurrage that might have accrued since this lawsuit began and Norfolk Southern has not informed me that any "new" demurrage has accrued. Similarly, Norfolk Southern has not invoiced me for any storage or accessorial charges nor informed me that any have accrued.


Given the present state of the economy, the volume of freight being exported through the Georgia Ports Authority has dramatically declined. Nevertheless, one company, Roxcel Corporation, has informed me it will begin using Savannah Re-Load's services to "reload" freight for export. Roxcel Corporation has informed Savannah Re-Load that shipments of freight destined for Savannah Re-Load's facility will begin on or about Monday, March 15, 2009. Based upon Savannah Re-Load's past experience with freight shipments, I expect this freight to arrive approximately seven to fourteen days later. When it arrives, if the deposit is in place, Norfolk Southern will refuse to deliver it unless Savannah Re-Load pays a deposit it cannot afford. This action will harm Savannah Re-Load's business relationship with Roxcel Corporation, likely causing it to discontinue using Savannah Re-Load's services.

Savannah Re-Load cannot afford to pay \$1,200 per rail car, per day when it may not receive a refund for 36-81 days, especially as Norfolk Southern has kept Savannah Re-Load's \$55,000 settlement payment. The demurrage deposit will severely harm, if not

destroy, Savannah Re-Load's business relationship with Roxcel Corporation. Additionally, Norfolk Southern's demurrage deposit prevents Savannah Re-Load from carrying on a primary business operation. Without rail service Savannah Re-Load will be unable to generate sufficient revenue to survive. If the deposit is not lifted, Savannah Re-Load will be unable to continue as a viable entity and will be forced to go out of business. Several members of Brampton Enterprises, LLC have personally guaranteed company debt. In the event Savannah Re-Load goes out of business and is unable to service its debt, they may be called upon to personally satisfy these obligations."


WILLIAM GROVES

Sworn to and subscribed before me
this 16th day of March, 2009.


Notary Public

My commission expires: 4/5/10
(NOTARIAL SEAL)

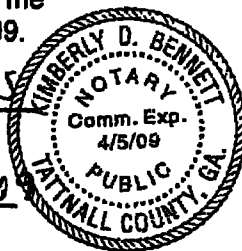
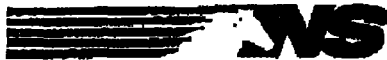


EXHIBIT A-1



Norfolk Southern Corporation
Treasury Department
110 Franklin Road, S.E.
Roanoke, Virginia 24042-0037
Fax: 540/981-4661
540/981-4167

Judy K. Sublett
Assistant Treasurer-Credit Manager
540/981-4663
judy.sublett@nscorp.com

John W. Brown
Assistant Credit Manager
540/981-4664
john.brown@nscorp.com

Danise B. Scott
Credit Analyst
540/981-4663
danise.scott@nscorp.com

March 4, 2009

FAX: (912) 965-0056

Mr. Billy Groves
Savannah Reload
139 Brampton Road
Garden City, GA 31408

Dear Mr. Groves:

A cash payment or certified check in the amount of \$1200.00 is now required from Savannah Reload for each empty ordered in to load, each load received for delivery, and each stop-off shipment.

This requirement is covered by Item 6160; NS Freight Tariff 8002-A (copy attached).

Sincerely,

A handwritten signature in cursive script that reads "Danise B. Scott".

Danise B. Scott
Credit Analyst

DBS/skh

Attachment

Cc: Trey Thigpen

NS 8002-A

ORIGINAL PAGE 55

**SECTION 6
RULES AND CHARGES FOR MISCELLANEOUS SERVICES**

ITEM 6160

SECURITY DEPOSITS FOR PAYMENT OF DEMURRAGE STORAGE AND OTHER ACCESSORIAL CHARGES

- (A) A security deposit to insure payment of any demurrage, storage and other accessorial charges that may accrue will be required from every customer who:
1. Is not on the railroad's credit list and
 2. Fails to pay demurrage, storage and other accessorial charges after specific written demand referring to this tariff provision.
- (B) The deposit must be paid in cash, certified check, cashier's check or money order before any freight car is delivered to such customer for loading or unloading. A deposit on one unit of equipment will not be transferable to another.
- (C) The deposit for each car shall be in the minimum amount of \$196.00 or up to the maximum amount of demurrage, storage and other accessorial charges that accrued on any one car during the preceding 12 months.
- (D) However, in the case of a customer receiving multiple cars for loading or unloading, the total amount required to be deposited shall not exceed the higher of the following two numbers:
1. \$2318.00 or
 2. the amount of existing past due demurrage, storage and other accessorial charges accrued by the customer plus \$397.00.
- (E) The deposit will be refunded after payment has been received for demurrage, storage and other accessorial charges on the corresponding equipment, should such charges have been incurred. The customer's request for refund must be made in the manner and to the office designated by the railroad. If no refund request is received by that designated office within thirty (30) days after the equipment is released, the railroad will refund the remainder of the deposit to the customer after deducting any unpaid demurrage, storage and other accessorial charges on that equipment.
- (F) Deposits will no longer be required after the customer either:
1. Is placed on the railroad's credit list, or
 2. Has paid all outstanding demurrage, storage and other accessorial charges, and has given assurance to the satisfaction of the railroad's credit office that future demurrage, storage and other accessorial charges will be paid within the credit period.

ISSUED FEBRUARY 1, 2000

EFFECTIVE MARCH 1, 2000.

ISSUED BY
J. H. Huddleston, Manager-Pricing Services
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S.E. Roanoke, VA 24042-0047

EXHIBIT A-2

CONDITIONAL SETTLEMENT AGREEMENT AND RELEASE

It is hereby agreed by and between Norfolk Southern Railway Company ("NS") and Brampton Enterprises, LLC d/b/a Savannah Reload ("Savannah") as follows:

WHEREAS, NS filed an Amended Complaint against Savannah with the U.S. District Court for the Southern District of Georgia, Savannah Division, Case No. CV407-155, seeking to recover \$70,680.00 in outstanding demurrage charges;

WHEREAS, Savannah filed an Answer to the aforementioned Amended Complaint denying all liability, and subsequently both parties filed separate Motions for Summary Judgment with the Court;

WHEREAS, the U.S. District Court filed an Order on September 15, 2008 granting Savannah's Motion for Summary Judgment and denying NS' Motion for Summary Judgment;

WHEREAS, NS thereafter filed a Notice of Appeal to the U.S. Court of Appeals for the 11th Circuit; and

WHEREAS, the parties have now agreed to a compromise settlement, the terms of which are conditioned entirely upon the approval of the courts as set out below, and the parties will proceed as follows:

1. The parties will file a Joint Motion pursuant to Federal Civil Rule 60(b) with the U.S. District Court for the Southern District of Georgia, Savannah Division, in which the parties will ask the U.S. District Court to certify that, upon remand by the U.S. Court of Appeals for the 11th Circuit, the U.S. District Court will grant the parties' Joint Motion pursuant to Federal Civil Rule 60(b), will vacate the Order and Summary Judgment entered on September 15, 2008, and declare it non-precedential. The parties will also file a Joint Motion to Stay the Appeal with the U.S. Court of Appeals for the 11th Circuit.

2. Should Savannah be named as consignee on bills of lading, electronic or otherwise, it shall be subject to accruing demurrage in accordance with, and if liable for the same under, the NS tariff and applicable law.

3. (a) The parties shall file the motions called for in paragraphs 1 and 3(b) as quickly as practicable.

(b) Upon written certification being issued by the U.S. District Court as set out in paragraph 1, *supra*, the parties will file a Joint Motion with the U.S. Court of Appeals for the 11th Circuit to remand the case to the U.S. District Court for adjudication of the parties' Joint Motion pursuant to Federal Civil Rule 60(b), as described in paragraph 1.

(c) Following remand, and the U.S. District Court having granted the parties Joint Motion pursuant to Federal Civil Rule 60(b), as described in paragraph 1, then within twenty days thereafter, NS and Savannah will execute and file with the U.S. District Court a stipulation of dismissal with prejudice of all claims pled in the lawsuit, and NS shall release Savannah of and from all liability for the claims asserted in the lawsuit.

(d) Savannah shall send payment in the amount of \$55,000.00 to NS via overnight delivery on December 12, 2008 in settlement of the claims pled in the Complaint. Upon receipt of such funds, NS will immediately waive its current practice of requiring Savannah to pay a demurrage deposit for rail cars. The aforementioned waiver is not permanent however, and may be reinstated should Savannah fail to pay whatever demurrage obligations it may incur and owe to NS. If the parties become obligated to do the necessary to reinstate the status quo as provided in item 4 below, NS will immediately refund said \$55,000.00 to Savannah and may re-impose the demurrage deposit on any rail cars which have not yet departed for Savannah's facility.

(e) NS will make a representative available within 7 days of receipt of such funds to discuss demurrage and a mutually acceptable framework within which the parties may operate in order to avoid future demurrage disputes.

4. Should the U.S. District Court or U.S. Court of Appeals for the Eleventh Circuit refuse to approve or grant any of the parties' joint motions or requests, as set forth above, or should the parties fail to comply with any of the requirements set forth in paragraph 3 above, then this Agreement shall automatically become null and void, and the parties will do the necessary to reinstate the status quo and proceed with the appeal now pending before the U.S. Court of Appeals for the 11th Circuit. A party cannot terminate or render this Conditional Settlement Agreement and Release null and void based upon its own breach.

5. This agreement can only be modified in writing by the parties, and is intended to be a compromise without prejudice to the rights, claims, and defenses of either party.

Intending to be legally bound, the undersigned are authorized to execute this Agreement on behalf of their respective principal parties.

ON BEHALF OF BRAMPTON
ENTERPRISES, LLC

ON BEHALF OF NORFOLK
SOUTHERN RAILWAY CO.

By: [Signature]

By: [Signature]

Print name: William S.R. Gross

Print name: William H. Finnegan

Title: Managing Member

Title: General Attorney

Date: 12/12/08

Date: Nov. 24, 2008

EXHIBIT B

NS 8002-A

ORIGINAL PAGE 55

**SECTION 6
RULES AND CHARGES FOR MISCELLANEOUS SERVICES****ITEM 6160****SECURITY DEPOSITS FOR PAYMENT OF DEMURRAGE STORAGE AND OTHER ACCESSORIAL CHARGES**

- (A) A security deposit to insure payment of any demurrage, storage and other accessorial charges that may accrue will be required from every customer who:
1. Is not on the railroad's credit list and
 2. Fails to pay demurrage, storage and other accessorial charges after specific written demand referring to this tariff provision.
- (B) The deposit must be paid in cash, certified check, cashier's check or money order before any freight car is delivered to such customer for loading or unloading. A deposit on one unit of equipment will not be transferable to another.
- (C) The deposit for each car shall be in the minimum amount of \$196.00 or up to the maximum amount of demurrage, storage and other accessorial charges that accrued on any one car during the preceding 12 months.
- (D) However, in the case of a customer receiving multiple cars for loading or unloading, the total amount required to be deposited shall not exceed the higher of the following two numbers:
1. \$2,310.00 or
 2. the amount of existing past due demurrage, storage and other accessorial charges accrued by the customer plus \$397.00.
- (E) The deposit will be refunded after payment has been received for demurrage, storage and other accessorial charges on the corresponding equipment, should such charges have been incurred. The customer's request for refund must be made in the manner and to the office designated by the railroad. If no refund request is received by that designated office within thirty (30) days after the equipment is released, the railroad will refund the remainder of the deposit to the customer after deducting any unpaid demurrage, storage and other accessorial charges on that equipment.
- (F) Deposits will no longer be required after the customer either:
1. Is placed on the railroad's credit list, or
 2. Has paid all outstanding demurrage, storage and other accessorial charges, and has given assurance to the satisfaction of the railroad's credit office that future demurrage, storage and other accessorial charges will be paid within the credit period.

ISSUED FEBRUARY 1, 2000

EFFECTIVE MARCH 1, 2000.

ISSUED BY
J. H. Huddleston, Manager-Pricing Services
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S.E. Roanoke, VA 24042-0047

EXHIBIT "C"

STATE OF GEORGIA
COUNTY OF CHATHAM

)
)

AFFIDAVIT

PERSONALLY appeared before the undersigned officer duly authorized to administer oaths, JASON PEDIGO, who, upon first being duly sworn on oath, deposes and states as follows:

"I am over the age of 18, competent to testify on my own behalf, and the following is based upon my personal knowledge.

Exhibit C-1 to my affidavit is an accurate copy of a letter I sent to Paul Keenan on September 19, 2008.

Exhibit C-2 to my affidavit is an accurate copy of a letter I received from Paul Keenan on September 23, 2008.

Exhibit C-3 to my affidavit is an accurate copy of the email I received from Varghese Kurlan, an attorney with Keenan, Cohen, and Howard, P.C. , on January 29, 2009.

Exhibit C-4 to my affidavit is an accurate copy of a letter I received from Paul Keenan on March 5, 2009.

Exhibit C-5 to my affidavit is an accurate copy of a letter I sent to Paul Keenan on March 5, 2009.

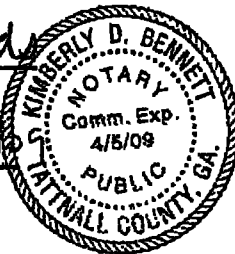
Exhibit C-6 to my affidavit is an accurate copy of a letter I received from Paul Keenan on March 6, 2009.

Exhibit C-7 to my affidavit is an accurate copy of a letter I received from Charles Howard on March 13, 2009."

Sworn to and subscribed before me
this 11th day of March, 2009.

Kimberly Richards
Notary Public

My commission expires: 4/5/09
(NOTARIAL SEAL)



[Signature]
JASON PEDIGO

EXHIBIT C-1

ELLIS, PAINTER, RATTERREE & ADAMS LLP.

ATTORNEYS AT LAW

**POST OFFICE BOX 9948
SAVANNAH, GEORGIA 31412-0148**

**TELEPHONE (912) 233-9700
FACSIMILE (912) 233-2261**

OFFICES:

**TENTH FLOOR
2 EAST BRYAN STREET
SAVANNAH, GEORGIA 31401-2602**

OF COUNSEL:

KIMBERLY COFER HARRIS

JASON C. PEDIGO

**912.231.8728
jpedigo@eprr-law.com**

**J. WILEY ELLIS (GA & NC)
PAUL W. PAINTER, JR.
R. CLAY RATTERREE (GA & CO)
DAVID W. ADAMS
SARAH B. AKINS
JAMES K. AUSTIN
TRACY C. O'CONNELL (GA & TX)
MAURY BOWEN ROTHSCHILD
DREW K. STUTZMAN
ROBERT S. D. PAGE
JASON C. PEDIGO
DANIEL C. JENKINS
J. PATRICK CONNELL
QUENTIN L. MARLIN**

September 19, 2008

VIA FACSIMILE NO. 215-609-1117

**Paul D. Keenan, Esq.
Keenan Cohen & Howard P.C.
One Pitcairn Place
Suite 2400
165 Township Line Road
Jenkintown, Pennsylvania 19046**

RE: Norfolk Southern/Brampton Enterprises

Dear Paul:

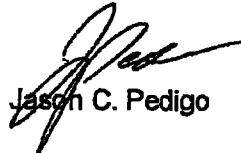
Thank you for your email dated September 16, 2008.

At this point, the Court has ruled that Brampton Enterprises is not liable for any demurrage that may have accrued. In light of that Order, there is no basis for Norfolk Southern to continue to require a deposit pursuant to NS 8002A, Item 6160. Therefore, I request that you confirm that Norfolk Southern has lifted its demurrage deposit requirement and is ready to resume rail car deliveries to Brampton Enterprises. If Norfolk Southern continues to impose a demurrage deposit or any other restriction, please provide me with the legal justification for this position.

If you have any questions, please feel free to give me a call.

I remain,

Very truly yours,


Jason C. Pedigo

JCP/kdr

**cc: Benjamin Perkins, Esq. (via facsimile)
Mr. Billy Groves (via regular mail)**

EXHIBIT C-2

PAUL D. KEENAN
DIRECT DIAL: 215-609-1112
PKEENAN@FREIGHTLAW.NET

LAW OFFICES

KEENAN COHEN & HOWARD P.C.

ONE PITCAIRN PLACE
SUITE 2400
165 TOWNSHIP LINE ROAD
JENKINTOWN, PA 19046

215-609-1110
(FAX) 215-609-1117

September 23, 2008

VIA E-MAIL AND U.S. MAIL

Jason C. Pedigo, Esquire
Ellis, Painter, Ratterree & Adams, LLP
2 East Bryan Street, 10th Floor
P.O. Box 9946
Savannah, GA 31412

Re: Norfolk Southern Railway Co. v. Brampton Enterprises
U.S. Court of Appeals for the 11th Circuit
Our File No. 4613-159

Dear Jason:

Thank you for your letter of September 19, 2008.

Your client's request to have Norfolk Southern lift its demurrage deposit requirement based upon the summary judgment ruling of the District Court is declined. As you know, the ruling of the District Court is presently unenforceable as the case is under review and now pending before the U.S. Court of Appeals for the 11th Circuit. Please let me know if you have any questions.

Very truly yours,

KEENAN COHEN & HOWARD P.C.

By:


Paul D. Keenan

PDK/nms

EXHIBIT C-3

Jason Pedigo

From: Varghese M. Kurian [VKurian@freightlaw.net]
Sent: Thursday, January 29, 2009 2:31 PM
To: Jason Pedigo
Subject: Savannah ReLoad

Jason,

We received the check from your client to NS. Due to a mailing mishap, we can not find the check. Please ask your client to void the check and issue a new check to NS. Thank you. Here's the info on the check that should be voided. Check no. 040302 from Coastal Bank, dated 12/12/08 for \$55,000.

Can you send the new check to my attention at the below address?

Thanks and sorry for the inconvenience,

Varghese M. Kurian
Keenan, Cohen, & Howard P.C.
One Pitcairn Place
Suite 2400
165 Township Line Road
Jenkintown, PA 19046
Direct {215}609-1108
Fax {215}609-1117
vkurian@freightlaw.net

CONFIDENTIALITY NOTICE: This e-mail message and attachments hereto may contain legally privileged and confidential information intended for the exclusive use of the addressee. If you are not the intended recipient, you are hereby notified that any viewing, copying, disclosure or distribution of this information may be subject to legal restriction or sanction. Please notify the sender by e-mail or telephone and delete the original message.

3/16/2009

EXHIBIT C-4

PAUL D. KEENAN
DIRECTOR OF LAW
P. KEENAN@FRENCHLAWFIRM.COM

LAW OFFICES

KEENAN COHEN & HOWARD P.C.

ONE PITCAIRN PLACE
SUITE 1400
165 TOWNSHIP LINE ROAD
JENKINTOWN, PA 19046

215-609-1110
(FAX) 215-609-1117

March 4, 2009

VIA U.S. MAIL

Jason C. Pedigo, Esquire
Ellis, Painter, Ratterree & Adams, LLP
2 East Bryan Street, 10th Floor
P.O. Box 9946
Savannah, GA 31401

Re: Norfolk Southern Railway Co. v. Brampton Enterprises
U.S.D.C., for the Southern District of Georgia; No. 4:07-cv-0155
U.S. Court of Appeals for the Eleventh Circuit, No. 08-15418-J
Our File No. 4613-159

Dear Jason:

Given that the U.S. District Court has refused to grant the parties' joint motion pursuant to Federal Civil Rule 60, the settlement agreement between the parties has been nullified, and the status quo must be restored. Accordingly, effective immediately, all demurrage deposit requirements have been reinstated for railcars placed by Norfolk Southern with Savannah Reload.

As we have indicated to you before, Savannah Reload's original check for \$55,000.00 has been inadvertently misplaced or destroyed by Norfolk Southern, and the issuing bank should be notified to stop payment on this original check.

Very truly yours,

KEENAN COHEN & HOWARD P.C.

By:


Paul D. Keenan

PDK/nms

EXHIBIT C-5

ELLIS, PAINTER, RATTERREE & ADAMS LLP

J. WILBY ELLIS (GA & NC)
PAUL W. PAINTER, JR.
R. CLAY RATTERREE (GA & CO)
DAVID W. ADAMS
SARAH B. AKINS
JAMES K. AUSTIN
TRACY C. O'CONNELL (GA & TX)
MAURY BOWEN ROTHSCHILD
DREW K. STUTZMAN
ROBERT S. D. PACE
JASON C. PEDIGO
DANIEL C. JENKINS
J. PATRICK CONNELL
QUENTIN L. MARLIN

ATTORNEYS AT LAW
POST OFFICE BOX 9946
SAVANNAH, GEORGIA 31412-0146
TELEPHONE (912) 233-4700
FACSIMILE (912) 233-2281

OFFICES:
TENTH FLOOR
2 EAST BRYAN STREET
SAVANNAH, GEORGIA 31401-2802

OF COUNSEL:
KIMBERLY COOPER HARRIS

JASON C. PEDIGO
912.233.4728
jpedigo@epra-law.com

March 5, 2009

VIA FACSIMILE NO. 215-609-1117

Paul D. Keenan, Esq.
Keenan Cohen & Howard P.C.
One Pitcairn Place
Suite 2400
165 Township Line Road
Jenkintown, Pennsylvania 19046

RE: *Norfolk Southern Railway Co. v. Brampton Enterprises*
Southern District of Georgia, Civil Action No. CV407155
Our File No. 5578-1

Dear Paul,

As an initial matter, I note that you do not contend that Federal Rule of Civil Procedure 62 permits this deposit. Instead, you rely upon the settlement agreement. The status quo in this case, at the time the settlement agreement was entered into, was that an order was in place which held that Brampton Enterprises was never liable for demurrage in the first place. Nevertheless, Norfolk Southern continued to maintain a deposit requirement without obtaining leave of court. The resumption of this status quo does not permit Norfolk Southern to avoid its obligations under Federal Rule of Civil Procedure 62. Whether you look at Norfolk Southern's actions now or at the time the parties executed the settlement agreement, your client failed to obtain a stay of the judgment and that judgment is enforceable. Thus, under either timeline, this deposit is invalid.

Regarding your suggestion that Brampton Enterprises notify the bank to stop payment on the check, I have already informed your firm that the bank will not issue a stop payment on a cashiers check. Therefore, Brampton Enterprises cannot simply put a stop payment on the check and get its money back. The money is gone from Brampton Enterprises' account, the check is fully funded, and Norfolk Southern has it. Pursuant to the settlement agreement, Norfolk Southern must "refund" the money. Norfolk Southern can comply with its obligation to refund the money by either returning the check or paying Brampton Enterprises \$55,000. As stated before, we are willing to discuss how to get around this problem with your client and prefer to negotiate a

Paul D. Keenan, Esq.
March 5, 2009
Page 2

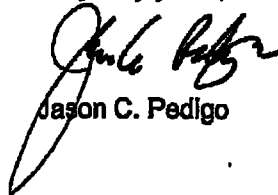
compromise that makes good business sense for both parties. However, I have not received any offer or counterproposal from Norfolk Southern.

This problem arises because of Norfolk Southern's negligence. Instead of even trying to see if there is a way to resolve these issues in a manner which is satisfactory to both parties, Norfolk Southern simply re-Imposes a deposit which has no basis under its tariff, fails to comply with the terms of the settlement agreement, and attempts to leave Brampton Enterprises \$55,000 poorer.

Under either the settlement agreement or federal law, Norfolk Southern may not impose this deposit. We are willing to negotiate in good faith to see if both sides can reach an mutually acceptable agreement. It costs Norfolk Southern nothing to similarly put forward this effort and leave the deposit lifted while the parties do so. Therefore, I ask that Norfolk Southern lift the deposit while the parties try to negotiate a way out of this. That would be in both parties best interest. If Norfolk Southern refuses, keeps what it knows to be an illegal deposit in place, and fails to refund Brampton Enterprises money, then we will have no choice but to infer that Norfolk Southern does not intend on acting in good faith and will proceed accordingly.

I remain,

Very truly yours,



Jason C. Pedigo

cc: Charles L. Howard, Esq. (via facsimile)
Benjamin Perkins, Esq. (via facsimile)
Mr. Billy Groves (via email)
James K. Austin, Esq. (via email)

EXHIBIT C-6

PAUL D. KEENAN
DIRECT DIAL: 215-609-1111
PKEENAN@PKEENANLAW.NET

LAW OFFICES
KEENAN COHEN & HOWARD P.C.

ONE PITCAIRN PLACE
SUITE 2400
165 TOWNSHIP LINE ROAD
JENKINTOWN, PA 19046

215-609-1110
(FAX) 215-609-1117

March 6, 2009

VIA FACSIMILE ONLY

Jason C. Pedigo, Esquire
Ellis, Painter, Rattexco & Adams, LLP
2 East Bryan Street, 10th Floor
P.O. Box 9946
Savannah, GA 31401

Re: **Norfolk Southern Railway Co. v. Brampton Enterprises**
U.S. Court of Appeals for the Eleventh Circuit, No. 08-15418-J
Our File No. 4613-159

Dear Jason:

In response to your letter of March 5, 2009, I believe I understand your client's concern with respect to the lost cashier's check. The bank will stop payment on the check and refund your client's money, but only on the condition that your client execute an indemnification bond to indemnify the bank should the check be presented by NS for payment. So as to properly protect your client from this exposure, I have enclosed an indemnification agreement executed on behalf of Norfolk Southern, favoring your client, should this lost check ever be presented for payment by Norfolk Southern. Accordingly, your client can now execute the Bank's indemnity form and have payment stopped on the instrument.

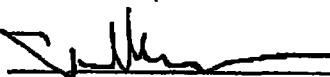
With respect to the demurrage deposit requirement which has been reinstated, I am exploring the prospect of an escrow arrangement with our client, and I may be authorized to extend a proposal on this by next week.

With respect to the various legal arguments referenced in your letter, it does not further my client's interests to debate these issues or exchange lengthy position letters. Suffice to say, we do not agree with the legal positions stated.

Very truly yours,

KEENAN COHEN & HOWARD P.C.

By:


Paul D. Keenan

PDK/nms
Enclosure

INDEMNIFICATION AGREEMENT

Background

In December of 2008, Brampton Enterprises purchased a cashier's check dated December 12, 2008, check number 040302, issued by The Coastal Bank and made payable to Norfolk Southern Railroad. A copy of this check is attached to this Agreement as Exhibit "A," and hereinafter referred to as the "lost instrument."

This lost instrument was subsequently tendered to Norfolk Southern Railway Company, but was inadvertently lost or destroyed while in the possession of Norfolk Southern Railway Company.

Indemnification Agreement

So as to allow Brampton Enterprises ("BE") to have its account credited in the amount of this lost instrument, Norfolk Southern Railway Company does hereby agree to indemnify and hold BE harmless from and against all claims, demands, actions, losses, damages, expenses, liabilities, or payments which BE shall sustain by reason of the lost instrument having been presented for payment by any person holding any right, title, or interest in it.

ON BEHALF OF NORFOLK SOUTHERN
RAILWAY COMPANY

By: [Signature]
Title: General Attorney
Date: March 6, 2009


	
THE COASTAL BANK	
D40302	
PAY TO THE ORDER OF <u>WHEELER SOUTHERN RAILROAD</u>	
DATE <u>12/12/2009</u>	
AMOUNT <u>50,000.00</u>	
Fifty Thousand Dollars	
CASHIER'S CHECK	
KROATTER REPORTING ENTERPRISES	
WOLFOOD CORP	
DELLER	
<i>Philip Smith</i>	

EXHIBIT A

EXHIBIT C-7

Chuch
CHARLES L. HOWARD
DIRECT DIAL: 215-609-1105
CHOWARD@FREIGHTLAW.NET

LAW OFFICES

KEENAN COHEN & HOWARD P.C.

ONE PITCAIRN PLACE
SUITE 2400
165 TOWNSHIP LINE ROAD
JENKINTOWN, PA 19046

215-609-1110
(FAX) 215-609-1117

March 13, 2009

VIA FACSIMILE

Jason C. Pedigo, Esquire
Ellis, Painter, Ratterree & Adams, LLP
2 East Bryan Street, 10th Floor
P.O. Box 9946
Savannah, GA 31401

Re: Norfolk Southern Railway Co. v. Brampton Enterprises
U.S.D.C., for the Southern District of Georgia; No. 4:07-cv-0155
Our File No. 4613-159

Dear Jason:

We have reviewed your response to Norfolk Southern's executed indemnification and escrow agreements. We trust that your client has been fully advised of Norfolk Southern's position with regard to both issues. Norfolk Southern is certainly aware of Brampton's position and will proceed accordingly.

Very truly yours,

KEENAN COHEN & HOWARD P.C.

By: 

Charles L. Howard

CLH:cmg

A-12

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

FILED
U.S. DISTRICT COURT
SAVANNAH DIV.

2009 MAR 19 PM 3:17

CLERK *M. Davis*
SO. DIST. OF GA.

NORFOLK SOUTHERN RAILWAY
COMPANY,

Plaintiff,

v.

BRAMPTON ENTERPRISES, LLC
d/b/a SAVANNAH RE-LOAD,

Defendant.

CASE NO. CV407-155

ORDER

Before the Court is a Motion for Expedited Briefing Schedule by Defendant Brampton Enterprises, LLC d/b/a Savannah Re-Load ("Savannah Re-Load"). (Doc. 86.) After careful consideration, Defendant's Motion is **GRANTED IN PART**. Plaintiff must file a response to Defendant's Motion to Enforce Judgment (Doc. 85) by **March 30, 2009**.¹

In its September 15, 2008 Order, this Court granted Defendant's Motion for Summary Judgment and held that it was not liable to Plaintiff for demurrage fees. (Doc. 29.) That Order resolved a dispute between one plaintiff and one defendant, and was based on facts specific to the controversy. The Court's Order has no effect on Plaintiff's contractual relations with its other customers.

¹ Defendant requested that Plaintiff's response be filed on or before March 23, 2009.


According to Defendant, Plaintiff has decided to ignore this Court's Order while the case is on appeal, treating the unpaid demurrage fees as a debt owed by Defendant. The terms of their contractual agreement allow Plaintiff to charge a \$1,200 per day, per railcar deposit when a customer owes it demurrage fees. These deposits may prevent Defendant from warehousing freight in Savannah and result in significant loss of business.

While the Court expresses no opinion as to the merits of Defendant's Motion to Enforce Judgment, Plaintiff's failure to recognize this Court's Order exposes it to significant risks. This Court will not hesitate to exercise its jurisdiction to preserve the status quo while this case is pending on appeal. See Farmhand, Inc. v. Anel Eng'g Indus., Inc., 693 F.2d 1140, 1145-46 (5th Cir. 1982) (recognizing the continuing jurisdiction of the district court in support of its judgment). If Plaintiff chooses not to respect this Court's authority, the Court has ample resources from which to draw upon, such as awards of attorney's fees and other more severe sanctions. In addition, Plaintiff later may find itself liable to Defendant for business losses incurred when it turned a blind eye to this Court's Order. While these are decisions for another day, Plaintiff should strongly consider the

potential pitfalls created by brushing aside an order of the Court.

After careful consideration, Defendant's Motion is **GRANTED IN PART**. Plaintiff must file a response to Defendant's Motion to Enforce Judgment by **March 30, 2009**.

SO ORDERED this 19th day of March, 2009.



WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

A-13

PAUL D. KEENAN
DIRECT DIAL: 215-609-1112
PKEENAN@FRSIGHTLAW.NET

LAW OFFICES
KEENAN COHEN & HOWARD P.C.

ONE PITCAIRN PLACE
SUITE 2400
165 TOWNSHIP LINE ROAD
JENKINTOWN, PA 19046

215-609-1110
(FAX) 215-609-1117

March 20, 2009

VIA FACSIMILE AND U.S. MAIL

Jason C. Pedigo, Esquire
Ellis, Painter, Ratterree & Adams, LLP
2 East Bryan Street, 10th Floor
P.O. Box 9946
Savannah, GA 31401

**Re: Norfolk Southern Railway Co. v. Brampton Enterprises
U.S.D.C., for the Southern District of Georgia; No. 4:07-cv-0155
U.S. Court of Appeals for the Eleventh Circuit, No. 08-15418-J
Our File No. 4613-159**


Dear Mr. Pedigo:

Please be advised that Norfolk Southern has reviewed your client's account and determined that Brampton Enterprises does not presently owe demurrage charges, other than those charges which are at issue in the above-referenced litigation. Accordingly, Norfolk Southern has lifted the demurrage deposit requirement. The lifting of this deposit requirement is without prejudice to Norfolk Southern's right to reinstate the deposit should Brampton Enterprises fail to pay demurrage charges which may become due and outstanding in the future.

Very truly yours,

KEENAN COHEN & HOWARD P.C.

By:


Paul D. Keenan

PDK/nms

STATE OF GEORGIA
COUNTY OF CHATHAM

)
)

AFFIDAVIT

PERSONALLY appeared before the undersigned officer duly authorized to administer oaths, WILLIAM GROVES, who, upon first being duly sworn on oath, deposes and states as follows:

"I am over the age of 18, competent to testify on my own behalf, and the following is based upon my personal knowledge.

Exhibit B-1 to my affidavit is an accurate copy of a letter I received from Denise Scott on or around July 10, 2007.

Exhibit B-2 to my affidavit is an accurate copy of an email received from Greg Ausborne on July 25, 2007.

Exhibit B-3 to my affidavit is an accurate copy of a letter I received from Anita Brown on or around July 27, 2007.

Exhibit B-4 to my affidavit is an accurate copy of a letter I received from Denise Scott on or around July 31, 2007.

Exhibit B-5 to my affidavit is an accurate copy of an email I received from Paul Young on August 1, 2007.

Exhibit B-6 to my affidavit is an accurate copy of a letter I received from Denise Scott on March 4, 2009.

Brampton Enterprises LLC (hereinafter "Brampton") typically unloaded and released rail freight delivered to its facility within twenty-four hours. From February, 2007, until the time Norfolk Southern Railway Company (hereinafter "NS") instituted the demurrage deposit, Brampton usually received five rail cars per day. After July 31, 2007,

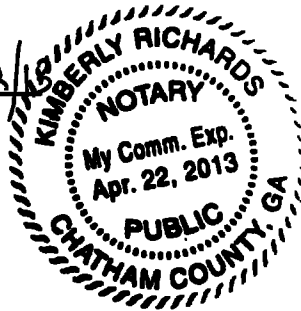
NS and Brampton had no further discussions concerning the accuracy of the demurrage invoices tendered to Brampton."


WILLIAM GROVES

Sworn to and subscribed before me
this 30th day of March, 2009.


Notary Public

My commission expires: 4/22/13
(NOTARIAL SEAL)



B-1

See comment on 4/17/08

VIA FAX/EMAIL: (912)-966-5254 and msayers@termco.net

July 10, 2007

Mr. Mark Sayers
Savannah Reload LLC
139 Brampton Rd
Garden City, GA 31408-2205

Dear Mr. Sayers:

Savannah Reload LLC owes Norfolk Southern a total of \$62,710 for demurrage charges accrued on railcars placed for loading or unloading. All of this receivable is delinquent with \$62,710 or 100%, past due.

We are currently reviewing your demurrage account and if immediate progress is not made, a demurrage deposit will be required as of July 19, 2007. This action could adversely impact your service, as we will require a security deposit on each car placed to Savannah Reload LLC for loading or unloading, to offset potential demurrage charges as per tariff NS 8002A, Item 6160. To prevent demurrage deposit requirement, we require receipt of payment or response on every bill on your account by July 17, 2007.

We would like to work with you to resolve this situation as soon as possible. Please contact Revenue Accounting- Customer Services (RACS) Manager, Paul Young at (404)529-1266 or Supervisor, Greg Ausborn at (404)529-1136 to discuss further. To view a detailed listing of delinquent bills on your account, log onto <http://accessNS.nscorp.com>.

Thank you for your immediate attention.

Sincerely,

Denise Scott
Credit Analyst

The Norfolk Southern Demurrage & Storage Tariff is available at:
www.nscorp.com/nscorp/html/marketing/publications.html

Cy: Baird Spicuzza - Director Marketing
Fred Florian - Director Marketing
Dan Pratcher - Director Sales
Carolyn Trimble - Account Manager
Paul Young - Manager, RACS

NS019

B-2

Billy Groves

From: "Ausborn, Greg J." <greg.ausborn@nscorp.com>
To: "Billy Groves" <bgroves@termco.net>
Cc: "Mark Sayers" <msayers@termco.net>; "John Cone" <johnc@conecocpa.com>; "Robert Groves" <RGroves@SouthAtlanticHoldings.com>; "Young, Paul C." <paul.young@nscorp.com>; "Brown, Anita L." <anita.brown@nscorp.com>; "Paul, Kathleen (Kitty)" <kathleen.paul@nscorp.com>
Sent: Wednesday, July 25, 2007 10:06 AM
Subject: RE: Savannah Re-Load Placement and Release History

All

Norfolk Southern has reviewed the dispute submitted by Savannah Reload and has made the below listed corrections for the months of March – May 07. At this time, that is all the relief the NS can offer you under our demurrage tariff NS – 6004. I have also forwarded your dispute and request to NS Sales and Marketing group and they have not offered any additional commercial relief. Therefore NS must request that the below balance for March – May be paid in full. Demurrage bill for June 07 is currently being reviewed per your records submitted. This issue must be resolved by August 6th or NS will turn this file over to our credit department and require a cash deposit before we spot any inbound equipment. Please advise if you have any additional questions and when NS can expect to receive payment on the below listed invoices.

Greg Ausborn
 Supervisor - RACS Demurrage
 PH 404 529 1136
 FX 404 589 6798
 email: Greg.Ausborn@nscorp.com

FB Date	Waybill	WB Date	Origination	Billed	Payment	Correction	Net
4/24/2007	901654	4/11/2007	SAVANNAH GA	\$30,210.00	\$0.00	(\$6,090.00)	\$24,120.00
5/15/2007	901631	5/10/2007	SAVANNAH GA	\$2,710.00	\$0.00	(\$1,390.00)	\$1,320.00
6/13/2007	901607	6/12/2007	SAVANNAH GA	\$15,420.00	\$0.00	(\$4,920.00)	\$10,500.00
6/20/2007	901630	6/12/2007	SAVANNAH GA	\$5,390.00	\$0.00	(\$3,590.00)	\$1,800.00
7/12/2007	901574	7/11/2007	SAVANNAH GA	\$19,560.00	\$0.00	\$0.00	\$19,560.00
				\$73,290.00	\$0.00	(\$15,990.00)	\$57,300.00

From: Billy Groves [mailto:bgroves@termco.net]
Sent: Wednesday, July 18, 2007 2:37 PM
To: Ausborn, Greg J.; Paul, Kathleen (Kitty); Brown, Anita L.
Cc: Mark Sayers; John Cone; Robert Groves
Subject: Savannah Re-Load Placement and Release History

Greg

Good afternoon. Attached is a spreadsheet detailing the placement and release dates for all cars placed at our facility from Jan 1 to July 11 as per your request. In addition, there is a memo that details Savannah Re-Load's position on the issue as well as a proposal for future service. If you have any questions, please let me know. We look forward to getting this issue resolved quickly. As per the memo, a hard copy of the attachments will be sent to Anita Brown tomorrow.

Thanks and best regards

Billy Groves
 Savannah Re-Load
 Phone: 912-965-0055
 Fax: 912-965-0056
bgroves@termco.net

7/25/2007

B-3



Norfolk Southern Railway
 Revenue Accounting Customer Services
 1200 Peachtree St.
 Atlanta, Georgia - 30309

Date: 07-27-2007
 0110580029
 SAVANNAH RELOAD LLC
 SAVANNAH, GA

Dear Sir/Madam

Enclosed you will find the following Demurrage bill(s) which have been reviewed by our Data Quality department in response to your claim.

F/B Number	F/B Date	Billed Amt	Paid Amt	Revised Amt	Net Due
4193164412	07-12-07	19560.00	.00	19260.00	19260.00
Totals		19560.00	.00	19260.00	19260.00

Comment: FTS PROCESS RUN.

Please handle the remaining balance for payment. If you have any questions, please refer to Norfolk Southern's demurrage tariff NS 6004. A copy of this tariff is available on line at : <http://www.nscorp.com/nscorp/html/marketing/publications.html>

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anita L. Brown'.

Anita L Brown
 Customer Account Rep
 Phone: 404-527-3489
 Fax: 404-589-6710
 Email: albrown2@nscorp.com

B-4



Norfolk Southern Corporation
Treasury Department
110 Franklin Road, S.E.
Roanoke, Virginia 24042-0037
Fax: 540/981-4661
540/981-4167

Judy K. Sublett
Assistant Treasurer-Credit Manager
540/981-4883
judy.sublett@nscorp.com

John W. Brown
Assistant Credit Manager
540/981-4884
john.brown@nscorp.com

Denise B. Scott
Credit Analyst
540/981-4665
denise.scott@nscorp.com

July 31, 2007

FAX: (912) 965-0056
EMAIL: bgroves@termco.net

Mr. Billy Groves
Savannah Reload, LLC
139 Brampton Road
Garden City, GA 31408

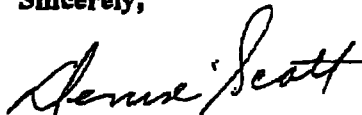
Dear Mr. Groves:

As a result of Savannah Reload, LLC's lack of payment or response on demurrage bills, a cash payment or certified check in the amount of \$1,200.00 is now required for each empty ordered in to load, each load received for delivery, and each stop-off shipment.

This requirement is covered by Item 6160; NS Freight Tariff 8002-A (copy attached).

The deposit requirement will be withdrawn once all bills over 15 days have been paid or properly disputed, and you have assured us that future bills will be paid in a timely manner.

Sincerely,


Denise B. Scott
Credit Analyst

DBS/haf

Attachment

cc: Greg Ausborn

B-5

Billy Groves

From: "Young, Paul C." <paul.young@nscorp.com>
To: <bgroves@termco.net>
Sent: Wednesday, August 01, 2007 8:33 AM
Subject: FW: Security Deposit


Billy Groves -

To follow-up our conversation, Norfolk Southern will require a \$1,200 deposit per car for any future rail equipment to be placed to the Savannah Re-load facility due to non-payment of outstanding demurrage totaling \$62,940.

As there are 25 cars currently in Savannah awaiting placement, demurrage charges will continue to accrue to Savannah Re-load until either a deposit is paid allowing cars to be placed and unloaded by Savannah Re-load or you make arrangements to turnover disposition to the shipper(s).

As it stands, Norfolk Southern will seek legal remedies for the yet unpaid demurrage charges.

Please do not hesitate to contact me if you have any further questions.

 Sincerely,

Paul C. Young
Norfolk Southern
1200 Peachtree Street, NE
Atlanta, GA 30309
(404-529-1266)


-----Original Message-----

From: Ausborn, Greg J.
Sent: Wednesday, August 01, 2007 7:59 AM
To: Young, Paul C.
Subject: FW: Security Deposit

FYI

Thanks

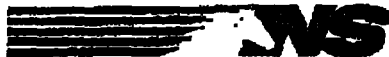
Greg Ausborn

 -----Original Message-----

From: Billy Groves [mailto:bgroves@termco.net]
Sent: Wednesday, August 01, 2007 7:50 AM

3/27/2008

B-6



Norfolk Southern Corporation
Treasury Department
110 Franklin Road, S.E.
Roanoke, Virginia 24042-0037
Fax: 540/981-4881
540/981-4187

Judy K. Sublett
Assistant Treasurer/Credit Manager
540/981-4883
judy.sublett@nscorp.com

John W. Brown
Assistant Credit Manager
540/981-4884
john.brown@nscorp.com

Denise B. Scott
Credit Analyst
540/981-4883
denise.scott@nscorp.com

March 4, 2009

FAX: (912) 965-0056

Mr. Billy Groves
Savannah Reload
139 Brampton Road
Garden City, GA 31408

Dear Mr. Groves:

A cash payment or certified check in the amount of \$1200.00 is now required from Savannah Reload for each empty ordered in to load, each load received for delivery, and each stop-off shipment.

This requirement is covered by Item 6160; NS Freight Tariff 8002-A (copy attached).

Sincerely,

Denise B. Scott
Credit Analyst

DBS/skh

Attachment

Cc: Trey Thigpen